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TABLE OF CONTENTS

		Page #
CHAPTER 1 - INTRODUCTION		1
A.	THE REFERENCE	1
B.	THE COMMISSION'S APPROACH	1
C.	OUTLINE OF REPORT	5
D.	ACKNOWLEDGEMENTS	5
CHAPTER 2 - ELDER ABUSE - THE SCOPE OF THE PROBLEM		7
A.	DEFINING THE PROBLEM	7
B.	THE EXTENT OF THE PROBLEM	10
C.	CONCLUSION	14
CHAPTER 3 - THE LAW IN MANITOBA		15
A.	INTRODUCTION	15
B.	THE *CRIMINAL CODE*	15
	1. General	15
	2. Peace Bonds	18
C.	*THE FAMILY MAINTENANCE ACT*	19
D.	*THE MENTAL HEALTH ACT*	19
E.	*THE VULNERABLE PERSONS LIVING WITH A MENTAL DISABILITY ACT*	21
F.	*THE POWERS OF ATTORNEY ACT*	22
G.	*THE HEALTH CARE DIRECTIVES ACT*	22
H.	CONCLUSION	23
CHAPTER 4 - COMPREHENSIVE ADULT PROTECTION REGIMES		24
A.	INTRODUCTION	24
B.	ATLANTIC PROVINCES	26
	1. The Scope of the Statutes	26
	2. Reporting a Vulnerable Adult	28
	3. Investigation, Intervention, and Jurisdiction	28
	4. Remedial Options	30
	5. Individual Rights	32
C.	THE BRITISH COLUMBIA *ADULT GUARDIANSHIP ACT*	33
	1. The Scope of the Statute	34
	2. Reporting a Vulnerable Adult	35
	3. Investigation and Intervention	35
	4. Remedial Options	37
	5. Individual Rights	37
D.	CONCLUSION	38

CHAPTER 5 - DOMESTIC VIOLENCE LEGISLATION IN CANADA AND OPTIONS FOR REFORM 41
A. INTRODUCTION 41
B. DOMESTIC VIOLENCE LEGISLATION IN MANITOBA, SASKATCHEWAN, ALBERTA AND PRINCE EDWARD ISLAND 42
1. Introduction 42
2. Scope of Domestic Violence Legislation 43
(a) Meaning of "domestic violence" 43
(b) Protected persons 45
(c) Applicants 47
3. Protection Orders 49
(a) Emergency protection orders 49
(b) Queen's Bench protection orders 54
4. Warrants Permitting Entry 58
5. Filing and Confirmation 59
C. CONSTITUTIONAL ISSUES 60
1. Section 96 61
2. *Charter* Rights 63
3. Division of Powers 65
D. POLICE RESPONSE AND ENFORCEMENT OF ORDERS 67
1. Introduction 67
2. Zero Tolerance and Vulnerable Victims 68
3. Orders and Enforcement 70
4. Flagging Potential Danger 72
E. CONCLUSION 73

CHAPTER 6 - ADDITIONAL REFORM MEASURES 75
A. VULNERABLE PERSONS LAW CLINIC 75
B. PUBLIC AWARENESS AND SYSTEM RESPONSE 76
C. FINANCIAL EXPLOITATION 80
D. REPORTING 81

CHAPTER 7 - LIST OF RECOMMENDATIONS 82

APPENDIX A - LIST OF PERSONS AND ORGANIZATIONS WHO RESPONDED TO OUR DISCUSSION PAPER AND THOSE TO WHOM COPIES WERE DISTRIBUTED 86

APPENDIX B - UNITED NATIONS *PRINCIPLES FOR OLDER PERSONS* 94

EXECUTIVE SUMMARY 97

RÉSUMÉ 103

CHAPTER 1

INTRODUCTION

Grow old along with me!
The best is yet to be,
The last of life for which the first was made:[1]

For too many Canadians, the poet's promise that "the last of life" is the best is not fulfilled. Older persons are the latest addition to the roster of those who may be abused, neglected, or exploited by intimates and caregivers.

A. THE REFERENCE

This project originated from a request by the Age and Opportunity Elder Abuse Resource Centre of Manitoba that the Commission investigate the present state of the law as it applies to the abuse of the elderly in the Province of Manitoba. In the early stages of its research, the Commission realized that the issues to be considered were not limited to the area of elder abuse but suggested the necessity to provide legal recourse to all adults in need of protection.

B. THE COMMISSION'S APPROACH

Prior to reaching its final conclusions, the Commission prepared a Discussion Paper on *Elder Abuse and Adult Protection* setting out various issues to be considered. In May 1998, it was distributed to interested individuals and organizations for comment and criticism. A list of those who responded and to whom copies were sent is contained in Appendix A to this Report. The Commission would like to thank the respondents for their thoughtful consideration of the issues and the time which they took in putting pen to paper; their submissions were invaluable to our deliberations and have been integrated as far as possible into this Report.

Vulnerability to abuse and exploitation can arise throughout the life span, in infancy and childhood, in adolescence and adulthood, and in the latter years of life. Abuse in childhood and children's exposure to abuse of others are correlated with partner, child and elder abuse when the child ages. This relationship between learned violence in childhood and abuse of an intimate is

[1]Robert Browning, "Rabbi Ben Ezra."

corroborated in the family violence literature. Early, effective, and multifaceted community-based interventions into domestic violence situations, whether a spouse or a child is the primary target, is central in breaking intergenerational cycles of violence. Policing plays a strong role in this response. Improvements in child protection, family support and spousal violence response, and support and intervention for adolescents who 'act out' in violent ways, may go far to reduce abuse across the life span and the passing-on of that training in violence to the next generation. Vulnerability is greater for those with physical or mental challenges that increase dependency on others. Age-linked disabilities such as Alzheimer's disease, physical and cognitive frailties, and the dynamics of increasing dependency make older persons similarly vulnerable. Even so, the age-based category of *the elderly* does not signal vulnerability in the same way as other categories of infirmity or disability. Adults who do not have a disability are also abused and exploited. In our view, a broad approach to the problem of abuse should take into account vulnerability across the life span and recognize the importance of early intervention.

Publicity surrounding law reform focused on *elder* abuse may result in greater public awareness and increased vigilance by family members, friends, agencies and professionals. This may prove temporary. In our view, public awareness can be created and better sustained by other means including education, continuing professional education, and response protocols that co-ordinate and direct police, agency, and medical intervention. There may be other drawbacks to law reform focused solely on *elder* abuse. That older adults may have special needs and special claims on society is undeniable. However, elder abuse legislation may reinforce social stereotypes of older persons as frail, vulnerable, and less worthy because of social, legal, physical, or cognitive incompetence. This mistaken view may invite predation and contribute to an environment conducive to abuse and exploitation. Negative stereotyping, in other words, creates disrespect and disrespect contributes to the dynamics of abuse and exploitation.

Early in its deliberations, the Commission recognized that law in the arena of familial relationships is a coercive and limited instrument. It therefore should be tailored closely, not to a general condition of the adult, but to specific areas of relief.

This brought us to the problem of defining who is an *older adult.* Media accounts and advertising campaigns — "Freedom 55", fare discounts, seniors' shopping days, "empty nest syndrome," and early retirement — often set the age at 55. Mandatory retirement at age 65 is not a breach of human right codes in most provinces. Adult protection legislation generally sets the age of intervention at 60. The Commission observed that any line drawn in legislation between *adult* and *elder* is necessarily arbitrary and difficult to justify on either theoretical or empirical grounds. It raises the question of why a younger adult in a like position of abuse and exploitation is not eligible for protection or services but must wait until a certain age is reached. The Commission recognizes the importance of service provision aimed at senior adults but is not of the view that legislation must be age-sensitive in order to benefit older persons. Indeed, legislation that is beneficial to abused and exploited adults will equally benefit older adults, if other support systems are in place.

To this end, this Report provides an overview of legislation applicable to adults in need of protection in Manitoba. Adult protection is intertwined with issues of competency, guardianship and health care decision making. Some provinces provide a complete legislative scheme incorporating competency, disability, guardianship, and powers of attorney. In our view, these areas are related but conceptually distinct. Adult guardianship and enduring powers of attorney provide protection for vulnerable adults who are demonstrably incompetent to deal with aspects of their daily affairs. As the Commission has issued Reports on enduring powers of attorney, self-determination in health care and competency, these issues will not be revisited in this Report.[2] Also outside the ambit of this Report is the governance of personal care homes and residential care facilities.

This raises the next series of questions. From what forms of abuse, committed by whom, is special protection required? How much choice should an adult have in receiving such protection? Where an adult who is or may be a victim of such acts has not sought help from an agency or the criminal justice system, what, if any, response is appropriate? Should an adult known to be a victim of continuing abuse, neglect or exploitation be able to refuse help? Social values are in conflict. Some adult protection regimes mandate reporting of abuse and neglect, often broadly defined, and grant agencies such powers of intervention as on-site medical examination and apprehension of suspected victims. These regimes parallel child protection legislation.[3] While they may provide a swift and decisive route to protective intervention, and appear to commit the state to take action, they also suspend or deny autonomy and choice, thus offending values protected by the Canadian *Charter of Rights and Freedoms*. These include freedom of expression and association and the right to life, liberty and security of the person. While child protection regimes may be justifiable under section 1 of the Charter, an overly-paternalistic and draconian response in the case of adults seems unlikely to be acceptable to the courts or to the public.

Yet it is recognized that victimization, especially by an intimate or caregiver, is itself a violation of the security of the person and a severe interference with freedom of expression and association. An adult who is exploited or abused by a caregiver or a cohabitant may be prevented from exercising autonomy and choice. Tactics of violence and exploitation are used to control victim access to information, help, services and, generally, external evaluation of the situation and

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[2]Manitoba Law Reform Commission, *Special Enduring Powers of* Attorney (Report #14, 1974); *Self-Determination in Health Care (Living Wills and Health Care Proxies)* (Report #74, 1991); *Enduring and Springing Powers of Attorney* (Report #83, 1994); *Informal Assessment of Competence* (Report #102, 1999).

[3]*Child and Family Services Act*, C.C.S.M. c. C-80. Age-based incompetence is no longer an absolute even in the case of childhood and its infirmities. Variable autonomy is reflected in mature minors rules, reforms to child sex laws which recognize graduated powers of consent, criminal accountability of adolescents under the *Young Offenders Act* and in various autonomy rights summed up in such documents as the United Nations *Convention on the Rights of the Child*. Paternalism directed at ameliorating the conditions of childhood finds wide social acceptance and justifies apprehension based on risk of harm as well as on actual harm and mandate reporting by all citizens of children in need of protection. Comparing the frailties of age to those of childhood is problematic. To suggest that at some stage a parent becomes the child of her child invites a comparable expenditure of personal and financial resources but it also invites the substitute decision making routine in childhood but indefensible when applied to adults unless there is serious lack of competence.

to maintain a relationship that in some way benefits the abuser. Control over another is the essence of such violence. Where abuse and exploitation prevent the victim from exercising basic human rights, then the failure of the state to take action may itself violate human rights.

The Commission takes the balanced approach to adult protection which recognizes victim rights to choice and to protection, by respecting victim autonomy and emphasizing the need for a coordinated, responsive and functional response by social and legal systems. Improved and enhanced response of the legal system, social service agencies, and professional caregivers may result in earlier detection of abuse, encourage self-reporting, and reduce violence and exploitation in the longer term.

The Commission adopts three premises. First, that the adult in question is competent. Questions of competence may arise in the course of intervening in an abusive or exploitive situation. If so, then other procedures and legislative regimes come into play. Second, elder abuse must be considered in the wider context of adult protection. Third, reform need not be draconian to be effective. Community-based responses that integrate institutional imperatives into local conditions and mores may be most effective, particularly where there is a consistent policing policy and province-wide coordination of services and information.

In 1992, the United Nations General Assembly approved a ten-year strategy and designated the year 1999 as the *International Year of Older Persons*. It invited all generations to reflect on ageing, participate in policy and program design, and take action at every level. Although this Report goes beyond the scope of "elder abuse", we believe it is appropriate that it appear in the *International Year of Older Persons*. The dedication of this year to older persons is an invitation to state parties, communities, agencies, families, and individuals to consider not only the situation of older persons but also life-long personal development, multi-generational relationships, and policy and social development in relation to ageing populations, as outlined in the *Principles for Older Persons* adopted by the United Nations General Assembly (see Appendix B). The theme underlying these initiatives respecting older persons — *towards a society for all ages* — stresses both the contribution of older persons to society and their integration into the framework of society. The 18 principles (meant 'To add life to the years that have been added to life') cluster around five themes — independence, participation, care, self-fulfilment, and dignity.

Independence includes income-generating opportunities, training and education, safe environments, and living at home as long as possible. *Participation* includes social integration, participation in policy formation and implementation, sharing knowledge and skills with younger persons, community service, and associations for older persons. *Care* includes protective family and community care consistent with cultural values, health care, legal and social services that enhance autonomy as well as protection, institutional care that is human, secure and intellectually stimulating, and the enjoyment of human rights and fundamental freedom in residential shelter, care or treatment facilities including full respect for dignity, beliefs, needs, privacy, and the right to make decisions about care and quality of life. *Self-fulfilment* includes access to educational, cultural, and spiritual resources. *Dignity* includes the right to live in dignity and security, free of

exploitation and physical and mental abuse, and the right to be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, or economic contribution.

The question before the Manitoba Law Reform Commission centrally involves the right to be free from exploitation and physical or mental abuse, falling under the theme of *dignity*. As the Principles suggest, abuse and exploitation must be considered in the context of other principles, as part of a holistic approach to ageing as a gradient and a normal part of the life span, and to older persons as integral to the social fabric and as rights-bearers whose choice and capacity must be respected.

C. OUTLINE OF REPORT

In Chapter 2, the Commission considers the definition of elder abuse and the scope of the problem. Chapter 3 provides an overview of existing related legislation and its application to adults who are abused, neglected, and exploited. In Chapters 4 and 5, we examine comprehensive adult protection regimes and domestic violence legislation in Canada and set out options for reform. Chapter 6 reviews other non-legal services which might be adopted or enhanced in order to provide support for the proposed legislative reform. Finally, a list of our recommendations can be found in Chapter 7. Appendix A contains a list of persons who responded to our Discussion Paper and those to whom copies were distributed; Appendix B reproduces the United Nations *Principles for Older Persons*. The Report ends with an Executive Summary of the Report (in both English and French).

D. ACKNOWLEDGEMENTS

We wish to thank all individuals and organizations who assisted us in conducting our research, in the preparation of our Discussion Paper and the finalization of this Report. In particular, we thank Prof. Anne McGillivray of the Faculty of Law, University of Manitoba, for the preparation of the Discussion Paper and her *ad hoc* committee composed of Prof. John Bond of the Faculty of Human Ecology, University of Manitoba; Ms Rosemary Cuddy of the Public Trustee Office; Murray Smith, a member of the Elder Abuse Resource Centre Committee, who assisted her in this task. Prof. McGillivray also reviewed all of the responses and prepared the draft Report for the Commission's consideration.

We also extend our thanks to Jonathan G. Penner and Blane Morgan, independent researchers, for their invaluable research contribution, and to Dale Gibson Associates who assisted the Commission in addressing some of the constitutional issues.

The final preparation of the Report and the recommendations it contains are, of course, ultimately those of the Commission.

We are also grateful to the various Departments of the Government of Manitoba and The Manitoba Law Foundation for providing the Commission with the funds necessary to complete this project.

CHAPTER 2

ELDER ABUSE - THE SCOPE OF THE PROBLEM

Although the scope of this Report has been expanded to adult protection, the Commission believes it would be useful to provide some background material on the issue of elder abuse, including a review of some of the studies which have been undertaken in this area.

A. DEFINING THE PROBLEM

Elder abuse was the last to be identified in a series of discoveries of the dimensions of family violence that began in the early 1960s. Child physical abuse (as *battered child syndrome*), a discovery of pediatric radiology, entered the public consciousness and civil law reform agenda early in this decade.[1] The 1960s and 1970s brought to the forefront the abuse of women by partners (as *wife battering* and *battered woman syndrome)* and child sexual abuse. These led to criminal law and policy reform in the 1980s.[2] The first reference to elder abuse (as *granny-battering*) appeared in the academic literature in 1975.[3] Elder abuse emerged on the reform agenda in Canada in the late 1970s, primarily due to the work of seniors' groups, caregivers, and gerontologists.

Definitions, typology, and causal explanations of elder abuse draw upon the study of other forms of family-related violence. As with other forms of abuse by persons in intimate, familial, or caregiving relationships, the study of elder abuse is complicated by low public visibility, victim reluctance to disclose, and control of disclosure by the perpetrator through threats, reprisals, and emotional manipulation.[4] Like other forms of family-related violence, elder abuse may take the form of physical, emotional, and financial abuse, the restriction or denial of rights and freedoms, and active and passive neglect.[5] It is further complicated by ageist stereotyping and by the fact that persons outside the family context may be perpetrators.

Physical abuse includes assault, the unnecessary use of physical restraints, and excessive

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[1] A. McGillivray, "Reconstructing Child Abuse: Western Definition and Non-Western Experience" in M. Freeman and P. Veerman, eds., *The Ideologies of Children's Rights* (1992) 213.

[2] Manitoba, with other Canadian provinces, adopted "no-drop" prosecution policies in the early 1980s. *Criminal Code* provisions for child sexual assault were amended in 1987.

[3] R.S. Wolf, "Elder Abuse: Ten Years Later" (1988) 36 *J. American Geriatrics Society* 758-762.

[4] R.M. Gordon and S.N. Verdun-Jones, *Adult Guardianship Law in Canada* (1992) (release 2, 1995) 2-2 to 2-2(a).

[5] Adapted from Gordon and Verdun-Jones, *id.* at 2-2.

medication. *Emotional, mental* or *psychological abuse* includes insults, intimidation, excessive paternalism, and the denial of the exercise of basic rights. Forced treatment, involuntary institutionalization, and control of lifestyle choices such as monetary expenditures, association with others, or the expression of religious or spiritual beliefs, are also forms of emotional abuse. *Financial* or *material abuse* includes theft, fraud, misappropriation of money, and mismanagement of assets by a guardian, attorney, or other person in a position of trust. *Active neglect* is the deliberate denial of the necessities of life. *Passive neglect* is the omission to provide these where one is legally bound to do so. *Abandonment* and *self-neglect* may be seen as separate heads of abuse, or as subheads of neglect. The Winnipeg Elder Abuse Resource Centre defines *elder abuse* as:

A. *Physical mistreatment* - involves the willful infliction of physical pain or injury, and/or sexual assault, eg., rough handling, shoving, slapping, pinching, kicking, restriction of movement.

B. *Psychological mistreatment* - encompasses behaviour that produces debilitating emotional stress or mental anguish, e.g., insults, intimidation, threats, infantilization, humiliation, harassment, coercion, social isolation.

C. *Financial/Material exploitation* - includes all misappropriations or improper or illegal conversion of money and/or other valuable possessions, e.g., theft, "conning", extortion, forced changes of wills, titles, and misuse of power of attorney.

D. *Neglect, both passive (unintentional) as well as active (intentional)* - involves a failure or refusal to fulfill a caregiving role to provide for the necessities of life, e.g., provide adequate heat, clothing, hygienic conditions, food, exercise and including the withholding of medications and abandonment.[6]

Over-sedation and the unnecessary use of physical restraints may be included in the definition.

Stress has been cited as a contributing factor in all forms of abuse. In recent family violence literature, its role has been downplayed as being an incomplete explanation and as sidestepping the intentional and hence culpable aspect of abuse. Caregiver stress, an explanation that dominated early elder abuse literature, results from exhaustion and loss of opportunity of an adult caring for an older person who may be emotionally, physically, and perhaps financially dependent on the adult. Learned violence and the repetition of a cycle of abuse is a second explanation. In the case of elder abuse, it may encompass retaliation against an ageing parent for childhood maltreatment or the acting-out of other lessons in violence learned in childhood. Children abused by parents or exposed to violence between parents are far more likely to abuse intimates than those without such experiences.[7] Where the perpetrator is a spouse, this may reflect

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[6]Quoted in M.J. Penning, *Elder Abuse Resource Centre: Research Component - Final Report* (unpublished, December 1992) 7.

[7]Canada, Standing Committee on Health and Welfare, Social Affairs, Seniors and the Status of Women (Sub-committee on Senior Citizens Health Issues), *Breaking the Silence on the Abuse of Older Canadians: Everyone's Concern* (June 1993) 15; M.J. Quinn and S.K. Tomita, *Elder Abuse and Neglect: Causes, diagnosis, and intervention strategies* (2nd ed., 1997) 86-126.

the ageing of a battered spouse and the continuation of a long-established pattern of spousal violence.

One portrait of a perpetrator is the pathological caregiver, who may be a substance abuser or suffer from psychiatric problems.[8] A more recent portrait is the dependent adult child who lives at home and relies on ageing parents for shelter, food, and money. The adult child may or may not provide care for the older person and may or may not be a substance abuser, but turns to emotional, and perhaps physical abuse, to gain advantage and maintain control. Financial manipulation and exploitation form a central part of this picture. The literature generally typifies the domestic abuser of older persons as one who lacks understanding of the needs of the elderly.[9] This person fastens blame upon the elder and at the same time depends on the elder for shelter and money.

Elder abuse may be seen in terms of the interplay of multiple factors on four levels of interaction. Personal factors include the older person's self-perception as helpless and dependent, whose problems magnify stress on the caregiving perpetrator. Interpersonal factors include unresolved past conflicts, power struggles, and a history of inadequate relationships with the perpetrator. Situational factors include the sandwich generation phenomenon in which a middle-aged caregiver provides for children and parents, as well as unemployment, substance abuse, marital problems, economic stress, the stress of constant care, and medical problems of both victim and perpetrator. Sociocultural factors include ageist evaluations of older persons as needful and as non-contributors to society. This reinforces personal factors including lack of self-esteem and self-evaluation. Ageism is also reflected in lack of attention to the problems of older adults. Related sociocultural factors include the reduced kinship obligations of the modern nuclear family and the wide geographical separation of family members.

A negative view of ageing and of older persons is entrenched in post-WWII institutional structures.[10] These include an artificial view of ageing introduced by mandatory retirement legislation in Canada and the United States in the 1950s.[11] Elder abuse as a social problem is driven by gerontologists typically involved with the problematic aspects of ageing, rather than

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[8]Quinn and Tomita, *supra* n. 7, at 111-117; Gordon and Verdun-Jones, *supra* n. 4, at 2-6.

[9]Based on C.L. McDaniel, *Elder Abuse in the Domestic Setting* (unpublished, December 19, 1996). McDaniel provides a brief annotated bibliography of works dealing with (primarily United States) government, community, and family response. We have added to the author's examples: <http://www.keln.org/bibs/mcdaniel.html>

[10]J. Harbison *et al.*, *Mistreating Elderly People: Questioning the Legal Response to Elder Abuse and Neglect*, vol. 1 (Nova Scotia, The Elder Abuse Legislation Research Team, 1995) 18.

[11]Mandatory retirement at age 65 was first imposed under Otto von Bismarck, "The Iron Chancellor", as part of social legislation in the new Germany in the 1880s. At the time, average life expectancy was well below this age. In order to recapitulate the ends of this prototypical legislation, mandatory retirement would not occur until age 75; D. Cohen, *The New Retirement: Financial strategies for life after work* (1999); "Author aims to debunk 'myth' of Freedom 55", *Winnipeg Free Press*, April 10 1999, C6. Manitoba human rights legislation prohibits mandatory retirement as age-based discrimination, the only Province to do so: *The Human Rights Code*, C.C.S.M. c. H175, s. 9.

with older persons generally.[12] More positive views of ageing based on more recent research and on the experiences of older adults have not had a major impact on these structures. Ageism -- negative images of older adults as dependent, vulnerable, unable to make appropriate decisions for themselves, and making no contribution to society -- is internalized and has a chilling effect. Older persons may be less able to combat abuse and exploitation, in that they may see themselves as having fewer rights and as unable to prevent it, or even as deserving it.

B. THE EXTENT OF THE PROBLEM

Compared with other forms of family-related abuse, empirical information on elder abuse is limited and equivocal. We know little about its incidence, the occurrence of its various forms, or the relationship, gender, and age of its victims and perpetrators. A random sampling of older adults living in private households in Canada in 1989 estimated that about 100,000 elderly people may have recently experienced serious maltreatment in their own homes, particularly material abuse, psychological abuse, physical abuse, or neglect. Material abuse was the most prevalent (25 cases per 1000), followed by psychological abuse (14 per 1000) and physical abuse (5 per 1000).[13] Victims of neglect, the study observes, tend to be more physically impaired and functionally dependent than other seniors.

A different approach was taken in a 1982 Manitoba Council on Aging study.[14] Researchers interviewed health and social service practitioners and identified 402 cases of abuse in their caseloads; 40% involved financial exploitation, 37% neglect, and 22% physical violence. The typical victim was a woman in her 70s. These numbers cannot be extrapolated to the population as a whole. Generally speaking, estimates of prevalence in the literature range from 1% to 10% of older adults, although 4% is the figure most often cited.

In 1990, the Age and Opportunity Centre Inc. founded the Winnipeg Elder Abuse Resource Centre to co-ordinate services, increase public awareness, educate professionals, and offer group counselling for those over 60 years of age.[15] Almost half of the 163 elders served by the Centre were referred by other agencies, involving 274 separate reports of abuse, in its first year of operation. One third were referred by friends or family members. Self-referrals accounted for only 17% of cases. The abuser was a spouse or adult son in the majority of cases, followed by a

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[12]Harbison *et al.*, *supra* n. 10, at 13-14.

[13]E. Podnieks, *et al*, *National Survey on Abuse of the Elderly in Canada* (1990) discussed in Gordon and Verdun-Jones, *supra* n. 4, at 2-5. See also Penning, *supra* n. 6, at 2; B. Carbonell, "A Harvest Yet to Reap: A Report of Elder Abuse Legislation in Canada" (unpublished paper for the Legal Research Institute, University of Manitoba, 1992) 3-11.

[14]D.J. Shell, *Protection of the Elderly: A Study of Elder Abuse* (1982) 26. There are methodological problems with this type of study. That a person is part of a caseload already signals need for assistance. This kind of study cannot take into account those who have not come to agency attention. Further, it relies on recall rather than direct (observed or experienced) reporting.

[15]Penning, *supra* n. 6, at 4-5.

grandchild, neighbour, sibling, or friend, while in 82% of the cases the victim was a woman. A combination of physical and psychological abuse was reported in 27% of cases, followed by financial abuse (18%), and psychological abuse (17%). Eighteen percent of victims were in immediate danger and, of this number, 81% were in danger of physical abuse.[16]

In the United States, based on reports to seniors' agencies, it was estimated that one in 20 older Americans is abused,[17] yet only one incident in 14 came to the attention of Adult Protective Services, the state- and county-based agency responsible for the health and well-being of adults over 60. This suggests that reported cases represent only the tip of the iceberg.[18] 1981 research estimates suggest that one in 10, or 2.5 million, older persons in the United States is abused. The 1996 estimate is lower, at from under 1 million to 1,860,000. The more consistent estimate, based on American studies, is four percent.[19]

A large-scale United States study, *The National Elder Abuse Incidence Study* (NEAIS) completed in 1998 analyzed data collected in 1996 from 20 counties in each of 15 states.[20] For each county sampled, data was collected from two sources — reports from the local Adult Protective Services (APS) agency responsible for receiving and investigating reports in each county and reports from specially-trained "sentinels", members of a variety of community agencies having frequent contact with older persons.

Individuals were counted only once, irrespective of whether more than one type of violation was reported, more than one report was made concerning the same incident, or different incidents were reported for the individual during the study period. The study measured physical abuse, sexual abuse, emotional or psychological abuse, financial or material exploitation, abandonment, neglect, and self-neglect. Of some 44 million adults in the United States over the age of 60 in 1996, 450,000 or almost 1% were abused or neglected in domestic settings, while a further 101,000 were self-neglecting. Of this total, 115,110 or 21% of cases were reported to and substantiated by the Adult Protective Services. The remaining 435,901 or 79% of cases — almost four times as many cases — were not reported to Adult Protective Services. However, the total number of cases reported to Adult Protective Services in 1996 represented a significant increase from 1986, suggesting an increase in public awareness.

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[16]Penning, *supra* n. 6, at 9-12.

[17]McDaniel, *supra* n. 9, at 1.

[18]National Center on Elder Abuse (United States), "Elder Abuse in Domestic Settings," Elder Abuse Information Series #1.

[19]The rates cited here seem out of line with both United States and Canadian studies. As noted, Podnieks cites a prevalence rate of four percent. The 1979 Block and Sinnott study puts the prevalence rate of elder abuse in the United States at about four percent. The 1988 Pillemer and Finkelhor study puts this figure at 3.2%, with rates for types of abuse ranging from .04% for neglect to 2% for physical violence: cited in Penning, *supra* n. 6, at 2.

[20]The National Center on Elder Abuse at the Administration on Aging, *The National Elder Abuse Incidence Study: Final Report* (September 1998), The American Public Human Services Association (formerly The American Public Welfare Association): <http://www.aoa.gov/abuse/report/>

Perpetrators in 90% of cases were spouses or relatives. Adult Protective Services data showed adult children as the largest category of perpetrators, ranging from 43% in neglect to nearly 80% in abandonment (with, however, the lowest actual number of cases). Sentinel data showed adult children as perpetrators in 39% of all cases. As family members are most frequently primary caregivers in domestic settings, the finding is not surprising. According to Adult Protective Services and sentinel data, most perpetrators were younger than their victims.

Gender of victims was asymmetrical. Women were victims in a disproportionate number of cases. Women made up 58% of the over-60 population but accounted for 60% to 76% of victims in all forms of maltreatment except abandonment, according to Adult Protective Services data; and 67% to 92% according to sentinel data. Cases of emotional (psychological) abuse showed the greatest gender disparity according to Adult Protective Services data, with women accounting for 75% of victims. Sentinel data showed the greatest disparity in financial abuse, where women accounted for 92% of victims.

Age was a factor in victimization. Fifty-two per cent of victims of neglect were over 80, according to Adult Protective Services data, and 60% according to sentinel data. Adult Protective Services data showed that those over 80 were disproportionately subjected to physical abuse, emotional abuse, and financial exploitation, at two to three times their proportion of the over-60 population.

Gender of perpetrators, when distributed across all categories of abuse and neglect, was almost equal according to Adult Protective Services data. This is due to the preponderance of neglect cases and the frequency of neglect perpetrated by women (52 %) compared with men (48%). As more women than men are caregivers to older persons, this differential is to be expected. In all other categories of abuse, according to Adult Protective Services data, men outnumbered women by at least 3 to 2. The preponderance of abuse by men is statistically significant, both in Adult Protective Services reports and in sentinel data.

The question of gender and age in relation to elder abuse was addressed in a small-scale study based on cases handled by the Winnipeg Elder Abuse Resource Centre.[21] The study compared elder abuse by a spouse with elder abuse by an adult child and analyzed variables of gender, age, and incidence for each type of abuse. The definition of *elder* was a person 60 and older. An *adult child* was an adopted or biological child 18 and older. *Elder abuse* was an act or acts as defined by the Centre and substantiated by Centre screening or police investigation. While the elder abuse literature had been relatively silent as to gender implications for both victims and perpetrators, other family violence literature suggests that gender is a factor, often a large factor, in family-related violence. Age had been identified as a risk factor in elder abuse literature, in that adults over 75 were seen as particularly vulnerable to abuse compared with those between 60 and 75. The impact of ageism on the social evaluation of women had been noted in feminist studies.

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[21]S.J. Chrichton, "Elder Abuse: A Feminist Perspective" (M.Sc. Thesis, University of Manitoba, March 1998).

Fifty cases of spousal abuse and 50 cases of abuse by an adult child were randomly selected from Centre files, encompassing a total of 185 incidents: 99 of these perpetrators were adult children, of which 52 lived with the victim; and 86 were spouses, of which 69 lived with the victim. There were 75 instances of psychological abuse, 50 of financial abuse, 47 of physical abuse, and 13 of neglect.

Males were perpetrators in the majority of cases. Of 185 incidents, 138 involved a male perpetrator. The incidence of male spousal perpetrators and of female child perpetrators were both higher than projected in elder abuse literature. Victim gender matched study expectations: 81 females were victims of adult children, and 74 were victims of male spouses. That adults over 75 are more likely to be victims was not supported but the small-scale nature of the study must be borne in mind here. The question of whether the type of abuse is related to the perpetrator's relationship to the victim (spouse or child) was answered in the negative, with the exception of financial abuse (a child was more often a perpetrator than a spouse, in 37 of 50 instances).

The author of the study surmises that male conditioning toward power and domination in relationships maintains an "upper-hand" for men in relationships throughout the life span, and that ageism particularly affects women by representing them as reproductively and socially powerless. However, abuse by daughters required a different explanation. The number of daughters who were perpetrators was higher than expected, based on data for younger-aged family-related victim relations. While the study explores a variety of explanations for this aspect of elder abuse, it does not account for the simple hypothesis — that daughters are most frequently and most heavily vested with caregiving responsibility for ageing parents. The study observes that "there are clearly very different types of abuse dynamics co-existing under the umbrella term elder abuse. Daughters abusing mothers may be doing so for very different reasons than husbands abusing wives, and sons abusing parents."[22]

Some seven percent of older persons in Canada reside in personal care homes.[23] Studies suggest that residents are also vulnerable to physical and psychological abuse.[24] Caregiver stress is a factor in personal care homes.[25] Understaffing or poor vetting and surveillance of personnel may contribute to the problem. Fear of reprisal and lack of advocacy may have a chilling effect

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[22] *Id.*, at 51-52.

[23] Gordon and Verdun-Jones, *supra* n. 4, at 2-7.

[24] A 1987 Ontario study reported that almost half the nurses and nursing assistants interviewed had witnessed the abuse of elderly patients by nursing staff: Health Canada, Mental Health Division, Health Services Directorate, *Abuse and Neglect of Older Adults in Institutional Settings: A Discussion Paper Building from English Language Resources* (1994) 28-29, citing Y. Brillon, *Victimization and Fear of Crime Among the Elderly* (1987) 80. A 1989 United States study reported that 81% of nurses and nursing aides in nursing homes had witnessed at least one incident of psychological abuse and 36% had witnessed at least one incident of physical abuse in the preceding year; see K. Pillemer and D.W. Moore, "Abuse of Patients in Nursing Homes:Findings from a Survey of Staff" (1989) 29 *Gerontologist* 314 at 317.

[25] Gordon and Verdun-Jones, *supra* n. 4, at 2-5 to 2-6.

on complaint.

These studies do not disclose the full extent of elder abuse. However, large-scale incidence studies such as the National Elder Abuse Incidence Study may hold true in a Canadian context.[26] NEAIS data show that under-reporting of elder abuse is a problem, with at least five older persons identified as maltreated but not reported for each reported. To our knowledge, no similar large-scale studies have been conducted in Canada and there is little by way of empirical research that is externally valid. However, we do have sufficient information to suggest that action is needed on a number of fronts.

Further empirical study of factors based on perpetrator and victim characteristics and caregiving responsibilities is needed, in our view, in order to design ameliorative services. Such study might include:

- characteristics of perpetrators over 60 that suggest ways in which abuse can be reduced;
- characteristics of caregiving relationships among younger family members who financially exploit older persons that suggest ways in which exploitation can be reduced;
- the economic condition of victims compared with older persons generally;
- ways of broadening the reporting of sexual abuse;
- the impact of ethnicity on self-neglect;
- the impact of gender on reporting;
- identification of abuse and neglect;
- identification and reporting of financial exploitation.

C. CONCLUSION

In summary, the Commission believes that further empirical study should be undertaken with the aim of providing information on the origins, extent and severity of the problem of abuse, neglect and exploitation of older adults, including study of incidence and causal factors. Unfortunately, such a study is beyond the scope of this Report and of the resources of the Commission.

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[26] *C.f.* H. L. MacMillan *et al.*, "Prevalence of Child Physical and Sexual Abuse in the Community: Results From the Ontario Health Supplement," (1997) 278 JAMA 131-135.

CHAPTER 3

THE LAW IN MANITOBA

A. INTRODUCTION

A number of legislative regimes in place in Manitoba apply to adults in need of protection. A perpetrator may be prosecuted, jailed, made to pay restitution, and bound to observe conditions having to do with the victim's safety under the *Criminal Code*, which also offers peace bonds. *The Family Maintenance Act* provides emergency and long term protection orders. Adults whose competence is impaired can receive assistance under *The Mental Health Act*, *The Vulnerable Persons Living with a Disability Act*, *The Powers of Attorney Act*, and *The Health Care Directives Act*. Although there is no single regime in Manitoba for the protection of all vulnerable adults[1] or for older persons, the law offers protection and compensation for victims of violence and financial exploitation.

B. THE *CRIMINAL CODE*

1. General

Abuse of another is a crime where it takes the form of physical or sexual assault; threats of death, serious bodily harm, or property damage; unlawful confinement; criminal harassment; failure to provide the necessities of life to a dependent;[2] theft; fraud; or misappropriation of funds by a person in a position of trust. Punishment depends on the severity of the offence and the circumstances of the offender, including criminal record and rehabilitation potential. Offences against a spouse or child by a person in a position of trust or authority invite harsher punishment.[3] Penalties range from discharge to community service orders, fines, and incarceration. A sentence of incarceration may be served in the community — *conditional sentencing* — if the offender does not pose a future danger.[4] This provision, in force since 1997, may be problematic in family-related violence where the victim may still be vulnerable despite no-contact conditions of bail and sentencing.

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[1] Although the term "vulnerable adult" is used throughout this Report, it is not to be confused with the definition contained in *The Vulnerable Persons Living with a Disability Act* but rather refers to "an adult in need of protection".

[2] *Criminal Code*, R.S.C. 1985, c. C-46, s. 215, provides that an offence is committed if a person fails to provide necessaries of life to a person under his or her charge if that person is "unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and is unable to provide himself with the necessaries of life.."

[3] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2(a)(ii) and (iii).

[4] *Criminal Code*, R.S.C. 1985, c. C-46, s. 742.

The goals of sentencing are to denounce and deter criminal conduct, separate the offender from society where necessary, promote rehabilitation, make reparation to the victim and to society, and promote offender accountability.[5] Denunciation and deterrence may centre on the offender (specific deterrence), or on society if punishment is used to "send a message" (general deterrence). The court can choose from a variety of options based on these considerations. Where sentence is suspended or a conditional sentence imposed, the court can bind the offender to keep the peace and be of good behaviour, require attendance at school or work, ban use of alcohol and possession of firearms, set curfews, impose no-contact orders, and order treatment or counselling for, among others, substance abuse, sexual abuse, and anger.

The criminal law is not concerned with the individual victim but with broader social goals of reducing crime and reinforcing lawful behaviour. Even so, the criminal process can assist a victim of abuse in several ways. Satisfaction may result from the conviction of an offender and the imposition of a sentence that acknowledges the pain and damage caused by a person in a position of trust.[6] Incarceration offers a period of safety for the victim and rehabilitation, if successful, offers future safety. A judge or magistrate may issue recognizance orders even where charges are not laid, and order that the accused have no contact or communication with the victim on the release of an accused person pending trial. No-contact orders can be imposed in sentencing as a condition of discharge, a condition attached to a suspended sentence with probation, or part of a conditional sentence served in the community.

The court can order that the offender make restitution to the victim to compensate for stolen money or goods, damaged property, and financial loss resulting from bodily injury, including time lost from employment. Where the offender has caused or threatened bodily harm to a household member, expenses for rent, food, child care, and transportation incurred by having to move out of the offender's household can also be compensated. Restitution takes precedence over fines, to be levied only where this will not interfere with compensation.[7] The Victim Fine Surcharge offers a more general victim remedy.[8]

The Manitoba "zero tolerance" policy emphasizes charging and vigorous prosecution in

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[5] *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.

[6] Recent *Criminal Code* reforms emphasizing victim needs and input include the recognition of the abuse of a position of trust or authority as an aggravating factor in sentencing (s. 718), the requirement that the court consider victim impact statements where submitted (s. 722) and restitution.

[7] *Criminal Code*, R.S.C. 1985, c. C-46, ss. 738 (enacted in 1995 and now in force) and 739. An order of compensation is enforceable in criminal court in the same manner as a civil court award is enforced. Further, any money found in the possession of an offender at the time of arrest can be used by the court toward restitution; see s. 741.

[8] *Criminal Code*, R.S.C. 1985, c. C-46, s. 737 provides for a "victim surcharge" on fines under the Code and certain parts of the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and the *Narcotics Control Act*, R.S.C. 1985, c. N-1. Victim surcharge fines are payable to the Lieutenant Governor of the province for "providing such assistance to victims of offences as the Lieutenant Governor ... may direct from time to time." The fine must be imposed unless the offender demonstrates that "undue hardship to the offender or the dependants of the offender" would be caused and cannot exceed 15% of any fine imposed or, where there is no fine, $10,000.

family-related crimes.[9] The Manitoba Family Violence Policy defines elder abuse as any act or omission which jeopardizes or results in harm to the health or welfare of a person over the age of 60 years, including violence, threats of violence, and criminal acts which may include elements of emotional and psychological abuse, financial or material exploitation, active and passive neglect, and psychological abuse resulting in debilitating emotional stress or anguish. The perpetrator may be a partner, adult child or other relative, a friend, or a person providing care. The Manitoba Justice Policy Directive Guideline directs prosecutors to proceed with substantive charges grounded in a pattern of abuse against an older person irrespective of the willingness of the victim to give evidence or the level of the assault. Prosecutors are instructed to take a firm stand on sentencing. Even so, elder abuse cases "wash out" in early investigative stages.[10] The Winnipeg Family Violence Court, a special sitting of the Manitoba Provincial Court established in 1990 to deal with offences committed by a family member, has heard virtually no cases involving older victims.[11]

Over 90% of cases are settled by way of guilty plea. In the bargaining process, charges may be stayed and certain facts suppressed with them, including the future threat posed by the perpetrator.[12] If the case goes to trial, the defendant is protected by the presumption of innocence, a high standard of proof, and rights to due process. If the evidence is insufficient to support the charge, the result is a stay of proceedings or acquittal. Police and prosecutors may be reluctant to prosecute cases of elder abuse, particularly if the accused as well as the victim is an older person. The victim may be reluctant to testify. Such cases pose extra difficulty in gathering evidence sufficient to convict.[13] Many abusive acts — manipulation, demeaning comments, frightening histrionics, emotional blackmail[14] — are not crimes unless accompanied by threats of death or serious bodily harm. The system cannot guarantee that an offender will not reoffend, nor can it guarantee protection for the victim beyond a period of actual incarceration. Protection orders

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[9]Manitoba, Department of Justice, Criminal Justice Division, Policy Directive, Guideline No. 2:#ELD:1 (July, 1998).

[10]Interview with Insp. K. Biener, Winnipeg Police Services (March 1998). He describes a "learning curve" in police and prosecutors, in coming to understand that elderly people and other adults are entitled to self-determination and cannot be treated as children by the justice continuum. Cases involving older persons, persons with disabilities, and other vulnerable people must be built over time, with rapport established between police and the adult. In the course of the relationship, the behaviour of abused and abuser can be modified.

[11]Information based on Family Violence Court "court watch" program and data analysis: interview with Prof. J. Ursel, Department of Sociology, University of Manitoba (November, 1997). Recent initiatives of Manitoba Justice include the hiring of extra Crown attorneys to work on domestic violence cases, to a total of 10 specialized prosecutors. Prosecutors will follow cases through all levels of court and handle bail applications. A Family Violence Court information line allowing accused persons and victims to find out the status of their case is to be established. The amount of $15,000 has been set aside for judicial education on domestic violence, training programs will be held for government departments including income assistance counselors, and an additional counselor for the Women's Advocacy Program will be acquired: "Staff hired for domestic cases," *Winnipeg Free Press*, March 5, 1998, A3.

[12]See A. McGillivray, "*R.* v. *Bauder*: Seductive Children, Safe Rapists, and Other Justice Tales" (1997) 25 Man. L.J. 35 at 366-372.

[13]G.B. Robertson, "Legal Approaches to Elder Abuse and Neglect in Canada" in M.J. MacLean, ed., *Abuse and Neglect of Older Canadians: Strategies for change* (1995) 55 at 56.

[14]Blaming the victim for the offender's problems in order to obtain an emotional or material advantage.

issued as a condition of release or sentence may not be respected by the perpetrator or adequately enforced by police.[15]

The strength of the criminal justice system is also its weakness. It promises a rebalancing of power but it is also a powerful, blunt, denunciatory, and public intervention into private lives. It is not concerned with the complexities of intimate relationships. A victim may avoid the prosecution of a family member and fear rejection by other family members, loss of care, and being alone. These are strong deterrents to self-reporting.[16] The intimacy of the relationship and the accommodation of abusive behaviour over time may obscure the criminality of the conduct. Physical retaliation is a real possibility. Victims of partner violence risk death or serious injury when they complain or threaten to leave; and are at greatest risk after leaving.[17]

2. Peace Bonds

The peace bond, recognizance, restraining order, or surety to keep the peace is a preventive remedy available under the *Criminal Code*.[18] Peace bonds are broader in scope than orders under *The Family Maintenance Act*. Anyone can seek a peace bond against anyone else. Conditions can be imposed that are not available under *The Family Maintenance Act* (discussed below). Unlike other protective orders issued in the criminal process, a peace bond is available irrespective of whether charges are laid. The Provincial Court can "order that the defendant enter into a recognizance, with or without sureties, to keep the peace and be of good behaviour for any period that does not exceed twelve months, and comply with such other reasonable conditions prescribed...."[19] Conditions may include firearm restrictions and restrictions on communication and contact with the victim. Refusal to enter into a peace bond results in a prison term of up to twelve months and failing to abide by the terms of a peace bond is an offence.

Obtaining a peace bond usually requires evidence of actual or seriously threatened bodily harm to the applicant or the child of the applicant, or property destruction. There is no quick route

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[15]See the discussion of *The Family Maintenance Act*, C.C.S.M. c. F20, below.

[16]A. McGillivray and B. Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (1999) 73-75.

[17]Data collected by Federal Justice between 1974 and 1992 show that a married woman in Canada is nine times more likely to be killed by her husband than by a stranger: M. Wilson and M. Daly, "Spousal Homicide," (1994) 14(8) Juristat 1. For each man killed by his co-residing wife in Canada, almost four (3.8) women are killed by their co-residing husband but the ratio jumps to 10.1 women killed after they have left the relationship. Seperation increases the risk of a woman being killed by her husband by six times. In 1991, 270 women were murdered. Two hundred and twenty-five of these were solved. Of the solved cases, 210 women died at the hands of men and 125 were killed by intimate partners: Canada, Canadian Panel on Violence Against Women, *Changing the Landscape: Ending Violence—Achieving Equality* (Final Report, 1993) 10.

[18]*Criminal Code*, R.S.C. 1985, c. C-46, s. 810.

[19]*Criminal Code*, R.S.C. 1985, c. C-46, s. 810(3)

for emergency situations. A complainant must "swear out" an information at Provincial Court offices and a hearing date is set, usually several weeks later. The person against whom the bond is sought must be notified and is entitled to appear in court to challenge the bond. Peace bonds issue for one year. A new bond may be sought when the first expires but the full process again must be undergone. A year is unlikely to be long enough, in abusive situations, for revenge to cool. Renewal may provoke harassment and reprisal.[20]

C. *THE FAMILY MAINTENANCE ACT*[21]

The Family Maintenance Act, administered by the Court of Queen's Bench, deals with marital breakdown. Until the enactment of *The Domestic Violence and Stalking Protection, Prevention and Compensation Act* in 1998 and its proclamation on September 30, 1999, emergency and permanent protection orders available under the Act included non-cohabitation orders, orders of exclusive occupation of the matrimonial home and non-molestation orders which prohibit a spouse from entering any premises where the other spouse is living and from molesting, annoying, or harassing the spouse or any children in that person's custody. Except for non-cohabitation orders, these provisions have been repealed and similar provisions can now be found in *The Domestic Violence and Stalking Protection, Prevention and Compensation Act*. There are transitional provisions for orders still in effect issued under *The Family Maintenance Act* prior to the coming into force of the legislation.[22] In view of these recent amendments, the relevance of this Act to the issues under consideration in this Report is very limited. *The Domestic Violence and Stalking Protection, Prevention and Compensation Act*, on the other hand, is of significant relevance and will be considered in detail in Chapter 5.

D. *THE MENTAL HEALTH ACT*[23]

As a result of the recommendations of the Mental Health Review Committee in 1997, this Act was substantially amended in 1998 and the new provisions were proclaimed in force on

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[20]Peace bonds are a *Criminal Code* remedy but do not require trial and the standard of proof is comparatively low (reasonable grounds, rather than the criminal standard of "beyond a reasonable doubt"), arguably an infringement of procedural rights in the criminal process. The purpose is consistent with keeping the peace and loss of liberty is minimal. It is unlikely that constitutional challenge would succeed.

[21]*The Family Maintenance Act*, C.C.S.M. c. F20. Section 1 defines "spouse" as a married person. The Act also provides that "[w]here a man and a woman who are not married to each other have cohabited", either may apply for these orders: s. 14(2). For the purposes of this discussion, married couples and unmarried cohabiting couples are referred to as spouses.

[22]*The Family Maintenance Act*, C.C.S.M. c. F20, ss. 10(1)(c) and (d) Part V, Division 2, repealed by *The Domestic Violence and Stalking Protection, Prevention and Compensation and Consequential Amendments Act*, S.M. 1998, c. 41, s. 29.

[23]*The Mental Health Act*, C.C.S.M. c. M110.

October 29, 1999.[24]

The Mental Health Act is a form of adult guardianship legislation designed to protect an adult with a mental disorder (as defined in the Act) or otherwise incapable of managing his or her affairs. The Act empowers the Court of Queen's Bench to issue an Order of Committeeship appointing any person as committee responsible for managing the adult's personal and financial affairs, or financial affairs only. The Public Trustee may be appointed as committee without court order, pursuant to Part 8 of the Act, which gives the Public Trustee the same powers as a private committee. The Public Trustee and a committee appointed by the court for both property and personal care may:

a) determine where and with whom an incapable person should live, either temporarily or permanently;
b) consent or refuse consent to medical or psychiatric treatment or health care on the incapable person's behalf, if the incapable person is not mentally competent to make the treatment decision;
c) make decisions regarding daily living on the incapable person's behalf;
d) commence, continue, settle or defend any claim or legal proceeding that relates to the person.

In addition, the Public Trustee has the power to protect an incapable person from abuse and neglect, as well as exploitation. The Public Trustee also has the power to take any emergency intervention action that is necessary to protect the incapable person, including:

a) removing him or her to a place of safety, if the Public Trustee believes, on reasonable grounds, that the incapable person is or is likely to be abused or to suffer neglect; and
b) there is immediate danger of death or serious harm or deterioration to the physical or mental health of the incapable person.

In all circumstances, the Public Trustee or the committee must take into consideration the incompetent person's wishes as specified in a health care directive. As well, any person may apply to the court for termination, replacement and variation of an appointment.[25]

The new provisions do appear to provide greater flexibility and autonomy to the incapable person than was afforded previously. However, given their very recent proclamation, the Commission has not had the time or resources necessary to review the provisions in detail.

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[24] Manitoba, *Report of the Mental Health Review Committee* (January 1997); *The Mental Health Act*, S.M. 1998, c. 36, s. 1 to 126 and 138 to 140, C.C.S.M. c. M110.

[25] *The Mental Health Act*, C.C.S.M. c. M110, ss. 60-113.

E. *THE VULNERABLE PERSONS LIVING WITH A MENTAL DISABILITY ACT*[26]

The Vulnerable Persons Living with a Mental Disability Act was carved out of *The Mental Health Act* to provide for persons once referred to as congenitally mentally retarded in a manner more respectful of autonomy and rights. Like its parent legislation, it is a form of adult guardianship law. The Act applies to persons with "significantly impaired intellectual functioning existing concurrently with impaired adaptive behaviour and manifested prior to the age of 18 years"[27] who are unable, alone or with the assistance of a support network, to manage daily affairs, personal care and property. The Act does not apply to those whose impairment resulted from accident or illness after the age of 18, to patients in psychiatric facilities, or to those who suffer from other forms of mental disorder.[28]

A substitute decision maker can be appointed to manage the personal care and property of the adult. The adult is to retain as much decision-making authority as possible, to be limited only where necessary for protection and well-being. The authority of the substitute decision maker is determined solely by the specific nature of the adult's incapacity.[29] Caregivers, substitute decision makers, and committees of vulnerable persons must report abuse or risk of abuse to the executive director, who must investigate all reports and has exceptional powers to enter premises, demand information, and examine documents. If there is an immediate danger of death or serious mental or physical harm to the vulnerable person, the executive director may take "such emergency intervention as is necessary to protect the vulnerable person" including removal of the adult to a safe place.[30]

The balance of the Act between autonomy and protection is admirable but its scope is narrow. For example it excludes those who incur a mental disability as defined in the legislation after the age of 18. In any event, it is too soon to evaluate the effectiveness of the Act in preventing the abuse, neglect, and exploitation of mentally disabled adults.

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[26] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90.

[27] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, s.1(1).

[28] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, ss.1(1) and 3. Its ambit is limited to those once classified as congenitally retarded, protected under state *parens patriae* powers and later by statute.

[29] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, ss. 53(1), 88(1), 57(1) and 92(1).

[30] *The Vulnerable Persons Living with a Mental Disability Act*, C.C.S.M. c. V90, ss. 21(1), 22, 23 and 26(1). The executive director is appointed under s.7 as administrator.

F. *THE POWERS OF ATTORNEY ACT*[31]

The Powers of Attorney Act sets out the regime by which an adult can execute an enduring power of attorney. This is a donor's grant of authority to the attorney to manage the donor's finances according to instructions if and when the donor becomes mentally incompetent, thus avoiding judicial appointment of a committee. The 1980 legislation provided no safeguards against duress and exploitation by an attorney.[32] Amended in 1996, the Act now addresses duress and undue influence in executing an enduring power of attorney and future exploitation by the attorney. The donor can name a third party who can demand an accounting from the attorney. Absent such a directive, the donor's nearest relative must be given an annual accounting. *The Mental Health Act* was also amended to provide that where a supervision order is issued declaring an adult incompetent, the power of attorney no longer reverts automatically to the Public Trustee. The Public Trustee must make reasonable inquiries to find out if an enduring power of attorney has been executed and, if so, whether the estate would be better managed by the attorney or by the Public Trustee.[33]

As amended, these Acts reduce the risk of financial exploitation by an attorney by requiring that the attorney be accountable to a third party.

G. *THE HEALTH CARE DIRECTIVES ACT*[34]

Imposing unwanted medical treatment is a basic denial of rights. A personal health care directive or *living will* instructs family members and medical practitioners on the nature and extent of medical or other treatment if, at some future time, the adult is incompetent or unable to communicate his or her wishes. The adult can set limits on medical treatment and appoint a person to make such decisions on the adult's behalf. *The Health Care Directives Act* provides some legal assurance that living wills will be respected by families and the medical profession. The health care directive tends to have greatest impact in serious circumstances such as the applying of extreme measures of resuscitation or maintaining life for extended periods of time on life support apparatus. However, should the health directive include the adult's desire to be euthanized in the event of contracting a painful and fatal disease, the directive would not be followed as it would be against the law to do so.

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[31] *The Powers of Attorney Act*, C.C.S.M. c. P97.

[32] *The Powers of Attorney Act*, S.M. 1980, c. 4.

[33] *The Mental Health Act*, C.C.S.M. c. M110, s. 80. During the course of the inquiry, the Public Trustee takes control of the estate. The family must be notified of the decision made and may appeal to the Court of Queen's Bench. An enduring power of attorney may now be filed with the Public Trustee: *The Powers of Attorney Act*, C.C.S.M. c. P97, s. 12.

[34] *The Health Care Directives Act*, C.C.S.M. c.H27.

H. CONCLUSION

It is important, in our view, that public access to and knowledge of the existing remedies in Manitoba be reviewed on an on-going basis. When changes to the current legislation are being considered, the drafters should also attempt to provide the necessary balance between autonomy and protection as has been done in *The Vulnerable Persons Living with a Mental Disability Act*.

CHAPTER 4

COMPREHENSIVE ADULT PROTECTION REGIMES

A. INTRODUCTION

The law in Manitoba does provide some protection for adults who are abused, neglected, or exploited. *The Powers of Attorney Act*, *The Mental Health Act*, and *The Vulnerable Persons Living with a Mental Disability Act*, discussed in the previous Chapter, are all examples of statutes that provide such protection. This Chapter, however, is concerned with a different type of statute, termed "comprehensive adult protection legislation".

"Comprehensive" legislation may address issues of guardianship, competence, mental disability, or committeeship, but its defining characteristic is its emphasis on protection against abuse and exploitation by means of agency intervention. Such legislation grants a designated agency a wide range of intervention powers. The focus thus shifts from competence and legal disability to vulnerability and agency intervention, removal of the victim from the home, and case planning. Although elder abuse was the driving force behind early adult protection legislation, recent statutes provide for all "vulnerable adults".[1] Comprehensive adult protection legislation is in place in all of the Atlantic Provinces and has been enacted but is not yet in force in British Columbia. The Law Commissions of Scotland[2] and England[3] have recommended variations of such legislation, while all 50 American States have adult protective services legislation and

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[1]A more limited approach is taken in the Provinces of Saskatchewan and Alberta, with a special protection orders regime designed for victims of domestic violence. Manitoba has recently enacted a similar regime, which came into force on September 30, 1999. These are discussed in Chapter 5. Prince Edward Island is unique in having adopted both types of legislation; its two Acts are discussed in Chapters 4 and 5 respectively.

[2]Scottish Law Commission, *Vulnerable Adults* (Report #158, 1997) 51. The Law Commission defines a "vulnerable adult" as one "in need of care and attention by reason either of infirmity or of the effects of ageing" or "suffering from illness or mental disorder, or "substantially handicapped by a disability." Reporting is not addressed, leaving the question to individual conscience. Where a report is received, the designated local authority must investigate, can demand entry at reasonable times, obtain a warrant of entry, inspect the premises, interview anyone on the premises, and demand a medical examination. In the event of refusal based on mental disorder or duress, the authority can proceed or seek a court order compelling co-operation. The adult can be removed if necessary to prevent "significant harm"without consent if there is duress or mental disorder. Notification of removal must be given to the adult unless a court determines that delay could be prejudicial. A court may also appoint someone to represent the adult's interests. The adult can apply for withdrawal or variation of the order.

[3]The Law Commission (England), *Mental Incapacity* (Report #231, 1995). The Draft Bill restricts application of the provisions to vulnerable persons defined as 16 or older who are or may be in need of care due to disability, age, or illness and who may be unable to protect themselves from significant harm or serious exploitation. The ambit of the legislation, then, is narrower than that of the legislation discussed below, and the threshold of intervention is higher.

maintain state-wide county adult protection centres.[4]

Comprehensive adult protection legislation protects a class or classes of persons from specific forms of mistreatment. Generally speaking, it applies to persons 18 and older who are incapable of protecting themselves from mistreatment as a result of mental disorder, illness, disability, duress, or physical restraint.[5] By offering some combination of mandatory and optional services, the legislation also addresses the circumstances of competent and capable adults who have not taken measures to protect themselves.

The powers given to intervening agencies, and the protection afforded to the relevant persons, vary from jurisdiction to jurisdiction. Some statutes authorize investigation, and entry into the home, only on the basis of reports of actual victimization, while others permit it on the basis of a perceived risk. Among the striking features of the legislation are powers of forcible entry, and provisions for on-site medical examination and removal of the adult with or without consent. In Manitoba, no-one other than a police officer may enter a residence without permission, and police entry without permission requires either a warrant or reasonable grounds for suspecting that a criminal act is in process. Under certain comprehensive adult protection statutes, however, grounds for entry may be provided by a report of suspected abuse. An adult who is abused, neglected, or exploited may be isolated and unable, or unwilling, to report to police, and the perpetrator or the adult himself may prevent entry into the home by investigators. Comprehensive legislation thus gives protection agencies "a foot in the door" to assess the circumstances and take further action.

The law has always sharply distinguished between childhood and adulthood. The child is presumed to be incapable of managing his or her own affairs, whereas the adult is, in law, presumed to be capable. Nevertheless, the law recognizes that adults are not *always* capable. Inability to know right from wrong is recognized in criminal, tort, and contract law: an adult who is incapable due to mental disorder or a mental disability is relieved from legal responsibility for their actions. In addition, the inherent jurisdiction of the state over those who lack full capacity is the foundation for legislation governing child protection, guardianship, and trusteeship. Children's need for protection rests on legal presumptions of vulnerability and limited capacity, which justify placing limits on their rights. When an adult is "vulnerable" or has limited capacity, the presumption that he or she is capable can be rebutted, and limits can likewise be placed on his

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[4] Federal laws on child abuse and domestic violence fund services and shelters for victims, but there is no comparable federal law on elder abuse. The federal *Older Americans Act* (42 U.S.C. (3001 et seq., as amended)) does provide definitions of elder abuse and authorizes the use of federal funds for the National Center on Elder Abuse and for certain elder abuse awareness, training, and coordination activities in states and local communities, but it does not fund adult protective services or shelters for abused older persons. All fifty states and the District of Columbia have enacted legislation authorizing the provision of adult protective services (APS) in cases of elder abuse. Generally, these APS laws establish a system for the reporting and investigation of elder abuse and for the provision of social services to help the victim and ameliorate the abuse. In most jurisdictions, these laws pertain to abused adults who have a disability/vulnerability/impairment as defined by state law, not just to older persons: The National Center on Elder Abuse (http://www.gwjapan.com/NCEA/laws/index.html).

[5] R.M. Gordon and S.N. Verdun-Jones, *Adult Guardianship Law in Canada* (1992) (release 2, 1995) 2-9.

or her rights.

The problematic logic of equating a *vulnerable* adult with one who is legally incapable of managing his or her own affairs is apparent in the circularity of the statutory definitions discussed below. The vulnerable adult is defined by circumstances, such as abuse, neglect, and exploitation, that induce vulnerability and limit choice. These circumstances then become the justification for nonconsensual and paternalistic intervention, which may limit choice still further. Despite statutory checks and balances, the powers granted to agencies to intervene into the life of an adult may seriously limit the adult's ability to exercise choice and autonomy.

In assessing the effectiveness and desirability of comprehensive adult protection legislation, the Commission has considered: the scope of the statute; requirements for reporting an adult in need of protection; powers of investigation and intervention; remedial options; and the legislation's effects on individual rights. The Commission has taken a thematic approach to the regulatory regimes in the Atlantic provinces, but has examined British Columbia's legislation individually, because it is the most recent Canadian initiative in comprehensive adult protection. Although it would be very useful to know how well these regimes work and how their operation is perceived by those who are their subject, there is little such information available.[6]

B. ATLANTIC PROVINCES

1. The Scope of the Statutes

The trend in Canadian adult protection legislation has been toward a clearer and more expansive definition of abuse. Newfoundland's *Neglected Adults Welfare Act*[7] of 1973 was the first such legislation in Canada. The Act is aimed at the *neglected adult* who is "not suitable to be in a treatment facility under *The Mental Health Act*" but is incapable of properly caring for himself due to physical or mental infirmity; or is not receiving proper care and refuses, delays, or is unable to provide for proper care.[8] *Neglect* is not defined in the Act.

Part III of New Brunswick's *Family Services Act*[9] (enacted in 1980), provides for protection against the abuse or neglect of *elderly or disabled persons*, or others as prescribed by

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[6]The Nova Scotia Act has been analyzed in the context of other adult protection legislation. See J. Harbison *et al.*, *Mistreating Elderly People: Questioning the Legal Response to Elder Abuse and Neglect*, vol. 1 (Nova Scotia, The Elder Abuse Legislation Research Team, 1995) 58. One problem noted was the serious over-reliance on the Act, to the exclusion of other legal remedies, due in part to the resources provided if an adult was declared to be "in need of protection." This led in turn to far more adults than warranted being denied autonomy: at 59.

[7]*Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3.

[8]*Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 2.

[9]*Family Services Act*, R.S.N.B. c. F-2.2.

regulation.[10] *Neglect* is defined as physical or sexual abuse or mental cruelty, or the risk of any of them.[11]

Nova Scotia's *Adult Protection Act*,[12] in effect since January 6, 1986, applies more broadly to an *adult in need of protection*, and combines elements of both the Newfoundland and the New Brunswick Acts. The Act protects adults who either are victims of physical or sexual abuse or mental cruelty, or are not receiving adequate care and attention, and are incapable of protecting or caring for themselves because of physical disability or mental infirmity. For intervention to be justified, the adult in question must also refuse or be unable to protect himself, or to provide for adequate care and attention.[13] The Act's scope is more limited than that of the New Brunswick legislation, in that it does not cover the risk of abuse and applies only to acts committed on the premises in which the adult resides.

Prince Edward Island's *Adult Protection Act*[14] defines an *adult in need of protection* as an adult "requiring legally authorized protective intervention in order to preserve essential security and well-being."[15] The need for protective intervention arises when an adult continually and repeatedly "is a victim of abuse or neglect by, or otherwise put in danger by the behaviour or way of life of, someone having *recognized supervisory responsibility* for the adult's well-being"; is unable to fend for himself or provide for necessary care; or "refuses, delays or fails to arrange for or comply with necessary care, aid or attention."[16] *Abuse* is defined as "offensive mistreatment, whether physical, sexual, mental, emotional, material or any combination thereof, that causes or is reasonably likely to cause the victim severe physical or psychological harm or significant material loss to his estate."[17] *Neglect* is defined as "a lack of or failure to provide necessary care, aid, guidance or attention which causes or is reasonably likely to cause" those harms.[18]

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[10] *Family Services Act*, R.S.N.B., c. F-2.2, s. 34(1).

[11] *Family Services Act*, R.S.N.B., c. F-2.2, s. 34(2).

[12] *Adult Protection Act*, R.S.N.S. 1989, c. 2.

[13] *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 3.

[14] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5.

[15] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 1(l).

[16] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 1(l) [emphasis added].

[17] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 1(a).

[18] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 1(k).

2. Reporting a Vulnerable Adult

Canadians are under no general legal obligation to report the commission of a criminal offence. Reporting a neglected adult, however, is mandatory in Newfoundland and Nova Scotia.[19] Failure to report is punishable by a fine of up to $200 or imprisonment for up to two months (or both) in Newfoundland,[20] and a fine of up to $1000 or imprisonment of up to a year (or both) in Nova Scotia.[21] Reporting is voluntary under the Prince Edward Island legislation; [22] the New Brunswick Act only explicitly refers to voluntary reporting by a *professional person*, defined broadly to include anyone who, by virtue of their employment or occupation, has a responsibility towards an elderly person or disabled adult.[23]

In most of the Atlantic provinces no one may take legal action against a person reporting a problem unless the report was made maliciously or without reasonable and (in Nova Scotia and Prince Edward Island) probable cause;[24] in New Brunswick, the person reporting the problem is protected against legal action as long as the report was made "in good faith".[25]

3. Investigation, Intervention, and Jurisdiction

Social services personnel bear the primary responsibility for investigating and intervening in cases of adult abuse or neglect. The statutes permit those personnel to apply for warrants or other court orders to overcome obstruction or lack of cooperation by either the person being investigated or others.[26] In Newfoundland and Prince Edward Island, hindering an investigation or failing to comply with a warrant or court order are offences.[27]

Newfoundland, New Brunswick, and Nova Scotia require the agency to initiate an

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[19] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 4(1); *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 5(1).

[20] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 4(3) and 15(2).

[21] *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 16(1) and 17.

[22] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 4(1).

[23] *Family Services Act*, R.S.N.B., c. F-2.2, s. 35.1(1).

[24] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 4(2); *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 5(2); *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 4(3).

[25] *Family Services Act*, R.S.N.B., c. F-2.2, s. 35.1(2).

[26] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 5(2); *Family Services Act*, R.S.N.B., c. F-2.2, s. 35(3); *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 8(2); *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 7(2).

[27] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 15(1); *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 31(a).

investigation on receiving a report about an adult in need of protection.[28] In Prince Edward Island the agency *may* make an investigation.[29]

Investigatory jurisdiction and powers vary among the Atlantic provinces. The Newfoundland and New Brunswick Acts permit the agency to investigate to determine whether a person is a neglected or (in New Brunswick) an abused adult; if anyone interferes the agency may obtain a warrant to enter by force in order to carry out the investigation.[30]

In Nova Scotia, the agency must begin by making preliminary inquiries, and if there are reasonable and probable grounds to believe an adult is in need of protection, must make an assessment. If the adult or anyone else interferes with or obstructs the assessment, the agency may obtain a court order authorizing police, social services personnel, a medical practitioner, or anyone else to enter the dwelling and assess the adult's circumstances.[31]

Similarly, Prince Edward Island authorizes the agency to order a preliminary investigation, followed if necessary by an "in-depth assessment" of the "condition, circumstances and needs" of the adult, including "health, social, residential, economic, vocational, educational and other conditions, related to the person's functional abilities to cope with the circumstances, to make reasonable judgments and to provide or make arrangements for his security and the meeting of his needs."[32] Where the adult or the person exercising supervisory authority over the adult does not co-operate "adequately," or the adult is "evidently unable to make a reasonable judgment about giving consent", the court can order the assessment.[33]

New Brunswick permits the agency to authorize a medical assessment of an adult without the adult's consent,[34] while Newfoundland and Nova Scotia require a court order before such a medical assessment can be carried out.[35] The Prince Edward Island Act does not explicitly address the issue of medical assessments.

The respective Provincial Courts have jurisdiction to deal with matters arising under the

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[28] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 5(1); *Family Services Act*, R.S.N.B., c. F-2.2, s. 35(1); *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 6.

[29] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 5.

[30] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 5; *Family Services Act*, R.S.N.B., c. F-2.2, s. 35.

[31] *Adult Protection Act*, R.S.N.S. 1989, c. 2, ss. 6 and 8(2).

[32] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, ss. 5 and 6.

[33] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 7(2).

[34] *Family Services Act*, R.S.N.B., c. F-2.2, ss. 35(1) and (2).

[35] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 5(1); *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 8(2).

Newfoundland and Nova Scotia Acts.[36] In New Brunswick jurisdiction is exercised by the Court of Queen's Bench,[37] and in Prince Edward Island by the Family Section of the Supreme Court.[38]

4. Remedial Options

Adult protection legislation generally provides a range of options once an agency has determined that an adult requires assistance. Newfoundland's Act is relatively silent on this subject, providing only that the court may order the neglected adult to remain at home under the agency's supervision, or to be removed to some other residence or institution under the agency's supervision.[39]

The New Brunswick Act, in contrast, provides a lengthy "shopping list" from which the agency may draw. The agency may provide social services to the adult, refer the matter to an appropriate agency (including the police or a hospital or "other institution"), or provide the services of a live-in homemaker with authority to exercise reasonable control and discipline over the adult.[40] If the adult in need of protection is mentally incompetent, the agency may apply to the court for an order placing the adult under the agency's supervision, authorizing the removal of anyone who may be a danger to the adult, requiring any person to pay support to the adult, permitting the agency to consent to medical treatment on behalf of the adult, or anything else that the court considers appropriate.[41] If the agency has reason to believe that a particular person is responsible for abuse or neglect of an adult, the agency may apply to the court for an order authorizing the removal of the offending person and, if necessary, his or her detention pending a further order.[42]

The Nova Scotia Act authorizes the agency to help the adult, if the adult agrees, to obtain services that will enhance the adult's ability to fend adequately for himself and to be cared for and protected.[43] If the adult does not or cannot accept the agency's assistance because of mental

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[36] *Neglected Adults Welfare Act*, R.S.N. 1990, c. C. N-3, s. 2(b); *Adult Protection Act*, R.S.N.S. 1989, c. 2, s. 3(d).

[37] *Family Services Act*, R.S.N.B., c. F-2.2, s. 1.

[38] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 1(f).

[39] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 6(4).

[40] *Family Services Act*, R.S.N.B., ss. 37(1) and 37(2).

[41] *Family Services Act*, R.S.N.B., ss. 37(1.1), 37.1, and 39(1).

[42] *Family Services Act*, R.S.N.B., s. 36(1).

[43] *Adult Protection Act*, R.S.N.S. 1985, c. 2, s. 7.

incompetence or duress, the agency may apply to the court for authority to provide the services.[44] The court can also order that any person who is a source of danger to the adult leave the adult's residence, be prohibited from contacting the adult, and pay maintenance to the adult.[45]

Prince Edward Island's legislation requires, if an in-depth assessment has determined that the adult is in need of protection or assistance, that the agency prepare a case plan of services and interventions.[46] Case planning must involve the adult and their supervisory person to "the fullest practical extent".[47] Where consent to intervention is not forthcoming, or the adult evidently cannot give informed consent, the agency may apply for a protective intervention order placing the adult under the agency's supervision.[48] The goal of planning, similar to the Nova Scotia Act, is to enhance the ability of a person in need of assistance to fend for himself or protect himself against abuse or neglect. Assistance that an agency may provide for in a case plan includes counselling and other social work, speech and hearing therapy, occupational therapy and physiotherapy, respite care and day care, socio-recreational activity and vocational training, homemaker services, nutrition advice, friendly contact, legal counsel, financial management services, applying for trustee or guardianship functions, residential accommodation, personal or nursing care, and any other health, social, or other type of service needed for the adult's welfare.[49]

The Prince Edward Island Act also permits emergency intervention without consent or court order, if there is an immediate danger of death or extreme harm to mental or physical health, or of loss or serious damage to the person's estate.[50] Within 120 hours of the intervention, the agency must apply to the court for an order authorizing the continuation of the intervention.[51] In Nova Scotia emergency intervention is authorized if the agency has reasonable and probable grounds to believe that an adult is vulnerable, life is endangered, and consent is withheld due to incompetence or duress. The adult can be removed involuntarily to a place of safety and must be returned home within five days unless the court finds, after hearing the supervisory person or the adult, that the adult is in need of protection.[52] In New Brunswick the agency can put an adult under protective care without a court order if the adult is neglected or abused, mentally

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[44] *Adult Protection Act*, R.S.N.S. 1985, c. 2, s. 9.

[45] *Adult Protection Act*, R.S.N.S. 1985, c. 2, s. 9(3)(d).

[46] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 8(1).

[47] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 8(2).

[48] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 11.

[49] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 10.

[50] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, ss. 23(1) and 24(1).

[51] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, ss. 23(2) and 24(2).

[52] *Adult Protection Act*, R.S.N.S. 1985, c. 2, s. 10.

incompetent, and in danger. The agency must apply to the court for an order authorizing continuing protective care within five days.[53] Under both the New Brunswick and Newfoundland Acts, the court may order the immediate removal of an adult to a hospital or other place on the basis of a medical practitioner's certification that it is necessary in the adult's interest.[54]

5. Individual Rights

There are several grounds on which adult protection legislation could be vulnerable to challenges under the *Canadian Charter of Rights and Freedoms*.[55] Entry into a residence without the occupants' consent, medical examination without consent, and detention of an adult are all *prima facie* violations of rights protected by the *Charter*,[56] including rights to security of the person, to be secure against unreasonable searches, and not to be arbitrarily detained. As well, people accused of abusing or neglecting an adult, or being a danger to them, have rights that must be respected. These include rights to fair notice, a hearing by a court or tribunal, proper standards and burdens of proof, legal counsel, and appeal.[57]

The Newfoundland Act requires that an adult or supervisory person must be given ten days' notice of an application for a declaration that the adult is a neglected adult, and any such application must be heard by the court forthwith.[58] The Act grants no special protections, such as right to counsel, but it does grant a right of appeal.[59] The New Brunswick Act's provisions are similar, although the court must advise the Attorney General if the adult requires a lawyer or other spokesperson.[60]

The Nova Scotia Act also requires ten days' notice of an application for a declaration that

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[53] *Family Services Act*, R.S.N.B., s. 37.1.

[54] *Family Services Act*, R.S.N.B., s. 40(2); *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 8.

[55] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

[56] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, ss. 7, 8, and 9.

[57] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11, ss. 7, 9, 10, 11, and 12.

[58] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 6.

[59] *Neglected Adults Welfare Act*, R.S.N. 1990, c. N-3, s. 16.

[60] *Family Services Act*, R.S.N.B., ss. 38 and 39.

an adult is in need of protection, but there is no requirement that the hearing be "forthwith".[61] A Nova Scotia Court described the approach as equivalent to child protection, noting that the seriousness of intervention must be kept in mind and the order must be made in the *best interests* of the adult.[62]

In Prince Edward Island, the agency must give fourteen days' notice if it seeks a protective intervention order for an adult in need of assistance who refuses or cannot give consent.[63] The court must be satisfied that intervention is in the adult's best interests before granting an order.[64] The adult can be represented by legal counsel at public expense if the court so decides.[65] The Minister bears the legal burden of showing that the order is in the adult's best interests, is "the least intrusive and restrictive option practical," and is more likely than any other method to provide a remedy.[66]

Although there have on occasion been challenges to some of the legislation discussed above, on the basis of a *Charter* breach, the statutes have to date withstood such challenges.[67]

C. THE BRITISH COLUMBIA *ADULT GUARDIANSHIP ACT*

The Province of British Columbia has recently introduced adult protection legislation, in the form of Part 3 of the *Adult Guardianship Act* of 1993, titled "Support and Assistance for Abused and Neglected Adults."[68] This is the most recent comprehensive adult protection legislation in Canada, and will come into force on February 28, 2000. The Act applies to the abuse or neglect of an adult anywhere other than in a correctional centre.

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[61] *Adult Protection Act*, R.S.N.S. 1985, c. 2, s. 9.

[62] *Nova Scotia (Minister of Social Services)* v. *J.G.* (1986), 73 N.S.R. (2d) 204 at 210-211 (Fam. Ct.). See also *Nova Scotia (Minister of Community Services)* v. *F.R.* (1988), 86 N.S.R. (2d) 147 at 153 (Fam. Ct.), where the Court stated: "Intervention in the life of an adult is a very serious matter to the adult who has fended for him or herself for most of his or her life. Such intervention is not to be taken lightly and ... serious consideration must be given not only to protecting the personal integrity, desires and lifestyle of the adult but also to the alternatives available to the adult if the Minister is given the authorization to intervene ... ."

[63] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 20(1).

[64] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 11.

[65] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 20(3).

[66] *Adult Protection Act*, R.S.P.E.I. 1988, c. A-5, s. 21.

[67] See, for example, *Nova Scotia (Minister of Community Services)* v. *Carter* (1988), 89 N.S.R. (2d) 275 (Fam. Ct.).

[68] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6. The Act is one of a number of statutes having the general aim of adult protection, including *The Community Care Facility Act*, R.S.B.C. 1996, c. 60, *The Public Guardian and Trustee Act*, R.S.B.C. 1996, c. 383, and *The Representation Agreement Act*, R.S.B.C. 1996, c. 405. Some or all of these Acts (including Part 3 of *The Adult Guardianship Act*) will come into force on February 28, 2000: B.C. Reg. 199/99.

Investigating abuse or neglect under the British Columbia legislation is the responsibility of any agency designated in the regulations by the Public Trustee; this may be "any public body, organization or person," and the Public Trustee may limit the functions of an agency in any way considered desirable.[69] Powers of intervention follow the Prince Edward Island Act, providing a "foot in the door" in emergency situations and control over the adult if the adult is incompetent or under duress.[70] The agency can forcibly intervene if the adult cannot extricate himself or herself from the situation because of physical restraint, a physical handicap limiting their ability to seek help, or any other medical condition that affects the adult's ability to make decisions about the abuse or neglect.[71] If there is no emergency, or the adult is found to be competent, no further action can be taken without consent. The Act provides for a graduated regime of services available to a competent adult, authorizes court orders mandating services as a last resort for adults who appear to be incompetent, and sets out a regime for the provision of protection orders.

"Guiding principles" for the administration and interpretation of the Act begin with the premise that "all adults are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and they are capable of making decisions about those matters."[72] Second, "all adults should receive the most effective, but the least restrictive and intrusive, form of support, assistance or protection when they are unable to care for themselves or their assets."[73] The statutory language is straightforward. Paternalistic terms such as *in need of protection*, *victim* and even *competence* are avoided. Older people are not singled out. The Act offers a wide range of protective services and protection of individual rights and autonomy.[74]

1. The Scope of the Statute

Definitions of abuse and neglect in the British Columbia legislation are similar to the definitions found in the Prince Edward Island Act, but are narrower in that they do not include the *risk* of abuse or neglect. *Abuse* is defined as deliberate mistreatment that causes physical, mental

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[69] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 61.

[70] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 49.

[71] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 49(3) and (4).

[72] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6 s. 2(a) Clause 2(c) also provides that "the court should not be asked to appoint, and should not appoint, decision makers or guardians unless alternatives, such as the provision of support and assistance, have been tried or carefully considered," and clause 3(1) states: "Until the contrary is demonstrated, every adult is presumed to be capable of making decisions about personal care, health care, legal matters or about the adult's financial affairs, business or assets."

[73] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 2(b).

[74] The Act does not override the *Health Care (Consent) and Care Facility (Admission) Act*, nor does it "prevent an adult's representative, decision maker or guardian from refusing health care for the adult in accordance with wishes the adult expressed while capable, even if the refusal will result in the adult's death." This protects personal health care directives and powers of attorney.

or emotional harm, or damage to or loss of assets and includes "intimidation, humiliation, physical assault, sexual assault, overmedication, withholding needed medication, censoring mail, invasion or denial of privacy or denial of access to visitors."[75] *Neglect* is defined as the failure to provide necessary care, assistance, guidance, or attention that causes or is reasonably likely to cause within a short period of time serious physical, mental, or emotional harm, or substantial damage to or loss of assets.[76]

Self-neglect, a category that does not explicitly appear in the Atlantic provinces' legislation, is defined as the failure to take care of oneself that causes, or is reasonably likely to cause within a short period of time, serious physical or mental harm or substantial damage to or loss of assets, and includes: grossly unsanitary living conditions; untreated illness; disease or injury; malnutrition that threatens to severely impair physical or mental health; the creation of a hazardous situation likely to cause serious physical harm to the adult or others, or substantial damage to or loss of assets; and illness, disease or injury that results in dealing with assets in a way likely to cause substantial damage or loss.[77]

2. Reporting a Vulnerable Adult

Reporting abuse or neglect to the authorities is voluntary, but those who do make a report are protected from legal action as long as the report was not made falsely or maliciously.[78] They are also protected against formal retaliation by their professional governing bodies, and formal or informal retaliation in the workplace.[79] This protection is unique to the British Columbia Act, although it is likely that the common law would provide similar protection.

3. Investigation and Intervention

Where an agency receives a report of abuse or neglect, has other reason for concern, or receives a report that the adult's representative has been hindered in contacting the adult, the agency must investigate.[80] The agency can enter without a warrant, using necessary and reasonable force, if the adult appears to be abused or neglected and incapable of consenting to

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[75] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 1.

[76] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 1.

[77] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 1.

[78] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 46(1) and (2).

[79] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 46(4) and (5).

[80] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 47(1).

their entry, and if immediate action is needed to preserve life or assets or prevent serious harm.[81] The adult can be removed to a place of safety, and the agency can continue its investigation.[82] In urgent but non-emergency circumstances, a justice of the peace may issue a warrant authorizing entry to interview the adult if there is reason to believe that the adult is abused or neglected and is unable to protect himself or herself.[83] If the agency is denied entry by anyone, including the adult, and the circumstances are not of an urgent nature, the agency can apply to the court for an order authorizing the entry of the agency, and/or a health care provider to assess the adult's condition.[84]

If there is reason to believe a criminal offence has been committed against the adult, the agency must report this to police.[85]

The agency must make every reasonable effort to interview the adult and may interview anyone else.[86] It may obtain a report from any health care provider, agency, or financial manager with whom the adult is involved.[87] Following its investigation, the agency may assist the adult to obtain appropriate services, and may prepare a support and assistance plan.[88] An adult who is competent must be involved in decisions "to the greatest possible extent."[89] The agency must explain the plan "in a manner appropriate to the adult's skills and abilities," if necessary enlisting the help of friends and relatives. If a competent adult "decides not to accept the services proposed in the support and assistance plan, they must not be provided."[90] As well, the agency can obtain a 30-day interim protection order requiring a person to leave the adult's residence (unless the person owns or leases the premises) and not contact or harass the adult.[91] The order must be served on both parties within 72 hours.[92]

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[81] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 59.

[82] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 59.

[83] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 49(3) and (4).

[84] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 49(1) and (2).

[85] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 50.

[86] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 48(1) and (2).

[87] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 48(2)(b).

[88] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 51(1).

[89] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 52.

[90] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 53(3) and (4).

[91] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 51(1)(e).

[92] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 51(2).

4. Remedial Options

A British Columbia agency can ask the Public Trustee to assess an adult's competence.[93] If the adult is incompetent, the agency can then apply to the court for an order authorizing services. Such an order can be granted only after a full judicial hearing. The assistance plan and assessment report must accompany the agency's application, with copies served on the adult, a spouse or nearest relative, the person against whom a protection order has been issued, the Public Trustee, a prescribed advocate, and other interested parties.[94] All persons served are entitled to be heard by the court. The burden of proof that the adult needs and will benefit from the plan rests with the agency.[95] The court may make any order it deems appropriate and in the best interests of the adult; it must specify the nature of the services imposed and these must be the most effective but least restrictive and intrusive possible.[96] The order terminates in six months unless an earlier termination date is set, and copies must be served on all persons who were served with the original application.[97] If there is reason to believe the adult's capacity has significantly changed, or the adult or a spokesperson requests a review "and has substantial reason for doing so," the agency must review the order and, if circumstances have changed significantly, apply to the court for change or termination of the order.[98] Finally, an order can be renewed only once.[99]

5. Individual Rights

Of the comprehensive adult protection regimes surveyed, the British Columbia Act most successfully balances individual rights with the need to protect abused or neglected adults, and offers the most detailed procedural protection of persons accused of abusing or neglecting an adult. Definitions of abuse, neglect, and self-neglect are sufficiently wide to encompass situations of significant concern, while intervention on the basis solely of a perceived risk is limited to

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[93] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 53(5).

[94] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 54.

[95] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 55.

[96] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6 (Supp.) s. 56. The order may include: admission to an available care facility, hospital, or other facility for a specific period of up to 6 months; the provision of available health care; the provision of available social, recreational, educational, vocational, or other similar services; supervised residence in a care home, the adult's home, or some other person's home, for a specified period of up to 6 months; and the provision, for a specified period of up to 6 months, of available services to ensure that the adult's financial affairs, business or assets are properly managed and protected, including any services that may be offered by the Public Trustee.

[97] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 56(6) and (7).

[98] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, ss. 57(1) and (2).

[99] *Adult Guardianship Act*, R.S.B.C. 1996, c. 6, s. 57(5).

urgent circumstances involving serious harm. Remedial orders must be as unintrusive as possible, and a competent adult must be involved in case planning and is entitled to refuse services. Finally, protection orders confining the adult to a treatment or protective regime can be appealed and terminate automatically.

D. CONCLUSION

Despite its general progressiveness, the British Columbia Act is problematic in certain respects. For example, while citizens are under no general legal obligation to report a crime, the Act is unique in requiring the responsible agency to report criminal activity. This requirement may have a chilling effect on reporting by family members, friends, and cohabitants, and on self-reporting by an adult who may otherwise desire police intervention or agency services. The purpose of agency intervention is to assist, support, and protect the adult. The advantage of an agency-based response is the offer of an alternative to criminal prosecution. While mandatory reporting of a criminal act involving the abuse or neglect of an adult may be justifiable on grounds that it relates to the agency's primary mandate, ultimately it may discourage abused or neglected adults from seeking protection, which is the very *raison d'être* of this type of legislation.[160]

Like the Atlantic provinces' legislation, the British Columbia Act permits forcible entry by the designated agency. Entry with a judicial warrant offers some protection, in that reasonable grounds must be established. However, the Act also permits forcible emergency entry without a warrant, based on a report of abuse or neglect, and removal of the adult without consent. Warrantless entry by force based only on a citizen report would appear to be an unjustifiably low threshold. A higher standard of reasonable and probable grounds and some form of judicial authorization would better protect the adult from unwanted and unwarranted intrusion. The Act also permits on-site examination of a reported victim by the agency or a medical practitioner who enters with the agency without the consent of the adult if incompetence or duress is suspected. Even if restricted to an oral test of competence or a cursory visual assessment (and it is not clear that this is the case), such an examination is an invasion of privacy and a serious interference with the security of the person. Arguably, entry without a warrant and examination of a reported victim without his or her consent requires more substantial grounding than the Act requires.

Adult protection legislation typically includes duress as well as incompetence. Whether an adult is prevented from exercising choice due to internal or external causes (incompetence or duress, respectively) may be largely irrelevant at the threshold level of intervention. However, duress can be relieved by removing the perpetrator from the scenario. It is not clear that removal of the victim should remain the focus of intervention. When an adult who has been apprehended is deemed competent, there is yet another stage of intervention that may be instigated by the agency, *i.e.*, "cooperative case planning". At this stage the adult is legally free to reject further

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[160] Mandatory reporting also places an additional burden on the staff of social agencies, in that as non-legally trained members of the public they may not know what constitutes a reportable crime, yet face legal consequences for failure to report one.

intervention. In view of the degree of interference with the adult's life that may have already occurred as a result of nonconsensual intervention, however, it may be unrealistic to expect the adult to believe that he or she is actually free to refuse further agency involvement. It is unfortunate, therefore, that adult protection legislation typically focuses on removal of the victim, rather than the perpetrator of the abuse or neglect.

Comprehensive adult protection legislation poses other practical and theoretical problems. For example, the agency is usually legally obligated to respond to all reports of elder abuse and abuse of vulnerable adults. Given the number of vulnerable adults visible on the streets in larger urban centres, and the high probability of a much larger number living in dangerous circumstances, this obligation may place great stress on agency resources. The promise of improved conditions is inherent in the concept of adult protection legislation. In order to fulfil this promise, appropriate services and resources must be in place. This being the case, it may well be that adult protection legislation promises more than society is realistically prepared to provide.

As well, such legislation may be over-used where lesser measures would suffice. The Nova Scotia Act has been criticized on these grounds.[101] This review recommended abolition of the statutory best interests test, which puts adults on par with children and presumes long-term incompetence, in order to ensure that the adult's wishes are respected and to bring the Act into line with the *Charter*.[102] It noted that the focus on competence has been "a significant source of frustration for those working with the Act".[103] It also recommended that mandatory reporting be replaced by voluntary reporting, that self-neglect and abuse be removed from the Act, and that abuse be addressed in the context of family violence initiatives and dealt with as a criminal problem, while nonetheless attempting solutions first at a delivery stage.[104] Financial abuse is not addressed in the Act, and the review recommended that such abuse should be dealt with under other service delivery systems. Finally, it concluded that: "No single legislative response to 'elder abuse' will be sufficient. A wide variety of problems are encompassed within the term; solutions appropriate to the different causes and considerations that arise with each must be used" with the adult's wishes being the deciding factor.[105] If these recommendations were adopted, the Act would apply only to psychological abuse and caregiver neglect.

As a unitary regime that encompasses all stages of dealing with the abuse or neglect of adults, from rescue to case planning and service provision, comprehensive adult protection legislation has much to recommend it. A designated agency with broad intervention powers and

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[101] Harbison *et al.*, *supra* n. 6.

[102] Harbison *et al.* *supra* n. 6, Summary, at vi.

[103] Harbison *et al.*, *supra* n. 6, Summary, at vi.

[104] Harbison *et al.* *supra* n. 6, Summary, at ix-xi.

[105] Harbison *et al.*, *supra* n. 6, Summary, at ix.

service capabilities could indeed remedy gaps in identifying cases of abuse or neglect and coordinating services. However, the Commission is of the view that legislation *per se* cannot be a complete answer to social problems. No legal regime can anticipate all eventualities in an area as diffuse and complex as adult protection, where problems take multiple forms and are deeply insinuated into social and familial relationships. Attempts to do so have created, in the Commission's view, blunt and intrusive legal instruments. The extreme protectionism at the heart of such statutes is at odds with the value placed in Canadian society on self-determination.

While comprehensive adult protection regimes may give agencies a necessary "foot in the door" in cases of suspected or actual adult abuse or neglect, such regimes would appear to compromise individual autonomy and due process rights, which rights may not be recognized until long after an adult and his or her intimates have experienced significant loss of liberty and legal repercussions. It is this compromise of rights that is the most serious failing of comprehensive adult protection regimes. In conclusion, therefore, the Commission would not recommend that such legislation be enacted in Manitoba.

CHAPTER 5

DOMESTIC VIOLENCE LEGISLATION IN CANADA AND OPTIONS FOR REFORM

A. INTRODUCTION

The remainder of this Report will be devoted to considering various alternatives to the enactment of comprehensive adult protection legislation in Manitoba. Our survey of Manitoba law in Chapter 3 discloses that ready access to protection orders by victims (and their delegates) and effective enforcement of these orders must form the foundation of any viable adult protection regime. The Commission is of the view that such measures, combined with widely available and accessible agency services (discussed in Chapter 6), are preferable to comprehensive adult protection legislation in that they will more successfully provide protection without compromising victim autonomy.

This Chapter will largely consist of a comparison of Manitoba's *Domestic Violence and Stalking Prevention, Protection and Compensation Act*,[1] proclaimed in force on September 30th, 1999, with the other domestic violence Acts in Canada, namely, the Saskatchewan statute upon which it is modelled, *The Victims of Domestic Violence Act*,[2] Alberta's *Protection Against Family Violence Act*,[3] and Prince Edward Island's *Victims of Family Violence Act*.[4] These Acts are concerned, not with vulnerable adults *per se* and their care by the state, but with the limited matter of providing victims of domestic violence (and, in Manitoba, of stalking) with ready access to protection orders. Lastly, this Chapter will consider the practical question of how protection orders available under Manitoba's domestic violence Act (and under the legislation discussed in Chapter 3) may be better enforced by police services.

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[1] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, S.M. 1998, c. 41, C.C.S.M. c. D93.

[2] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, proclaimed in force February 1, 1995.

[3] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, proclaimed in force June 1, 1999.

[4] *Victims of Family Violence Act*, S.P.E.I. 1996, c. 47, proclaimed in force December 16, 1996; cited as R.S.P.E.I. 1988, c.V-3.2.

B. DOMESTIC VIOLENCE LEGISLATION IN MANITOBA, SASKATCHEWAN, ALBERTA, AND PRINCE EDWARD ISLAND

1. Introduction

Manitoba's *Domestic Violence and Stalking Prevention, Protection and Compensation Act* arose from the Commission's *Report on Stalking*,[5] and the Schulman Report on a domestic murder-suicide, which recommended that Manitoba enact domestic violence legislation similar to Saskatchewan's *Victims of Domestic Violence Act*.[6] Recommendations of the two Reports were merged in the Manitoba legislation to cover domestic violence by a cohabitant, former cohabitant, or parent of a child (regardless of whether the parent has lived with the other parent at any time), and stalking by any person, including a former cohabitant or stranger.[7]

Note that Manitoba's Act is unique in that its remedies are available not only to victims of domestic abuse, but also to victims of stalking. "Stalking" is essentially defined as occurring when a person repeatedly engages in conduct that causes another person to fear for his or her own safety.[8] In addition to providing victims of stalking with access to protection orders, the legislation creates the tort of stalking, establishing a cause of action in a civil suit for damages (which may be brought without proof of damages).[9]

Insofar as they deal with domestic violence, however, the Manitoba, Saskatchewan, Alberta, and Prince Edward Island Acts are similar in that they share the same *raison d'être* and same remedial alternatives (with some notable substantive and procedural differences, discussed below). In each case the legislation is intended to protect and further assist victims of domestic violence by providing them with immediate access to protection orders in emergency circumstances (generally by application to a designated justice of the peace) and, in less urgent situations, with a means of securing more comprehensive protection orders from the Court of

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[5]Manitoba Law Reform Commission of Manitoba, *Stalking* (Report #98, 1997).

[6]Manitoba, Commission of Inquiry into the deaths of Rhonda Lavoie and Roy Lavoie, *A Study of Domestic Violence and the Justice System in Manitoba* (1997) (Hon. Mr. Justice P.W. Schulman, Commissioner) [hereinafter referred to as the "Schulman Report"].

[7]Note that section 264 of the *Criminal Code*, enacted in 1993, recognizes that behaviour such as repeatedly following or spying on another person, repeated unwanted contact, and other forms of harassment falling short of crime may constitute criminal harassment, if the conduct provides reasonable grounds for a victim's fear for their own personal safety or the safety of anyone known to them. Reform was expedited following the 1993 murders of two Winnipeg-area women killed by men who imagined a reciprocal romantic interest and who had engaged in multiple incidents of threatening behaviour. These incidents had been reported to police but no charges were laid.

Statistics Canada data for 1995 show that one-third of 4,446 stalking incidents involved a spouse or former spouse; the actual number of incidents is estimated to be 10,000 per year involving over 3,000 women. See A. McGillivray and B. Comaskey, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women, and the Justice System* (1999) 88.

[8]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 2(2).

[9]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 26(1).

Queen's Bench[10] which, for example, may include compensation for monetary losses suffered by the victim.

With respect to enforcement of protection orders, most jurisdictions leave breaches of orders to be prosecuted under section 127 of the *Criminal Code*, which provides that breach of a court order is an indictable offence punishable by up to two years' imprisonment.[11] Manitoba, Saskatchewan, and Alberta have adopted this approach to enforcement. However, under Prince Edward Island's Act failure to comply with the provisions of an order is a summary conviction offence, punishable in the case of a first offence by a fine of not more than $5,000 or up to three months imprisonment, or both, and in the case of a second or subsequent offence by a fine of up to $10,000 or by imprisonment of up to two years, or both.[12] The Commission is of the view that the maximum penalties in Prince Edward Island in respect of a first offence may be insufficient for serious contraventions, and is therefore persuaded that enforcing protection orders by recourse to the provisions of the *Criminal Code* is preferable to the approach adopted in Prince Edward Island.

2. Scope of Domestic Violence Legislation

Despite their general uniformity, the scope of the various Acts, determined by how domestic violence is defined, who is protected, and who may apply for protection, differs markedly.

(a) Meaning of "domestic violence"

"Domestic violence" is defined in section 2(1) of Manitoba's Act as occurring when a person is subjected by a cohabitant to: an act or omission that causes bodily harm or damage to property, or reasonable fear thereof; conduct that constitutes psychological or emotional abuse; forced confinement; or sexual abuse. This provision is virtually identical to its counterpart in Saskatchewan's Act, except that the latter Act does not include psychological or emotional abuse in its definition.[13]

Prince Edward Island's definition of "violence" is similar in substance to Manitoba's, with two noteworthy differences. First, unlike Manitoba's (and Saskatchewan's) Act, Prince Edward Island defines violence as *including* certain conduct, which gives designated justices of the peace and the court some leeway in determining whether conduct that does not fall squarely within the list of specified conduct (such as financial abuse, for example) should be characterized as violence

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[10]The Trial Division of the Supreme Court in Prince Edward Island.

[11]*Criminal Code*, R.S.C. 1985, c. C-46, s. 127.

[12]*Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 16.

[13]*The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 2(d).

in particular circumstances.[14] Second, Prince Edward Island's legislation is unique in that it includes a vicarious responsibility provision that states that a respondent who encourages or solicits another person to commit an act that, if done by the respondent, would constitute family violence, is deemed to have committed that act personally.[15]

Like Saskatchewan's *Victims of Domestic Violence Act*, Alberta's *Protection Against Family Violence Act* makes no reference to psychological or emotional abuse.[16] However, its definition of "family violence" is considerably narrower than its counterpart in Saskatchewan's legislation. For example, it stipulates that the act or omission that causes injury or property damage (or reasonable fear thereof) must have been done (or not done) *for the purpose of intimidating or harming* a family member.[17] No such element of intent appears in Saskatchewan's (or Manitoba's or Prince Edward Island's) definitions. As well, Alberta's legislation is unique in that it states explicitly that the definition of family violence "... is not to be construed so as to limit a parent ... from using force by way of correction toward a child ... if the force does not exceed what is reasonable under the circumstances."[18] None of the Manitoba, Saskatchewan, or Prince Edward Island legislation excludes such behaviour.

Given these differing notions as to what constitutes domestic violence, and particularly being mindful of the fact that emotional and psychological abuse are as potentially injurious and offensive as physical abuse or property damage, the Commission is of the view that the definition of domestic violence under Manitoba's Act is preferable to that of Saskatchewan's and Alberta's legislation inasmuch as it is the least restrictive. Even so, the Commission favours Prince Edward Island's definition of violence, both because of its vicarious responsibility provision and because of its wider approach to defining violence. Accordingly, the Commission recommends that Manitoba's Act be amended by the addition of a vicarious responsibility provision similar to that contained in Prince Edward Island's legislation, and by the adoption of a wider definition of "domestic violence".

RECOMMENDATION 1

That* The Domestic Violence and Stalking Prevention, Protection and Compensation Act *be amended to provide greater protection to victims of abuse by:

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[14] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 2(2). Note that while Alberta's definition of "family violence" also *includes* a list of specified conduct, the definition is in fact narrower than that of any of the other jurisdictions (discussed above).

[15] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 2(3).

[16] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 1(e).

[17] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 1(e)(I) and (ii).

[18] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 1(e).

(a) widening the definition of "domestic violence" to include certain conduct. Such an expansion would give designated justices of the peace and the court some leeway in determining whether conduct that does not fall squarely within the list of specified conduct should be characterized as violence in particular circumstances; and

(b) including a vicarious responsibility provision stating that a respondent who encourages or solicits another person to commit an act that, if done by the respondent, would constitute family violence, is deemed to have committed that act personally.

(b) Protected persons

As for *who* is protected by domestic violence legislation, under the Manitoba and Saskatchewan Acts protection orders are available to cohabitants, essentially defined as persons who reside together or have resided together in a family, spousal, or intimate relationship, and persons who are the parents of a child, regardless of their marital status or whether they have lived together at any time.[19] (Protection orders under Manitoba's *Domestic Violence and Stalking Prevention, Protection and Compensation Act* are also available to any person who is being stalked, regardless of the person's relationship with the stalker.[20])

The class of persons protected by Alberta's legislation is somewhat narrower than under Manitoba's and Saskatchewan's.[21] For example, unlike the Manitoba and Saskatchewan Acts, persons of the same sex who are residing or have resided together in an intimate relationship are implicitly excluded from the definition of "family member" (the counterpart to "cohabitant") in Alberta's *Protection Against Family Violence Act*.[22] (Similarly, Prince Edward Island's *Victims of Family Violence Act* extends protection to persons who are or have been in a "family relationship,"[23] which term is defined in part as "a man and a woman who are or have been married to each other or have cohabited in a spousal or sexual relationship.")[24] Equally noteworthy in Alberta's legislation is a provision that extends protection to persons who reside

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[19]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 1; *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 2(a).

[20]Stalking encompasses conduct by any person, unlike domestic violence, which is limited to conduct by a cohabitant: *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 2(2).

[21]Having said this, it should be noted that Alberta's Act is unique in extending protection to persons who reside together where one person has care and custody over the other pursuant to a court order. See: *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 1(d)(v).

[22]*Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 1(d)(I).

[23]*Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 2.

[24]*Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 1(d)(I).

together and are related to one or more persons in the household by blood, marriage, or adoption;[25] the counterpart provisions in the Manitoba and Saskatchewan Acts extend the same protection to persons who reside together and who *have resided together*.[26] This means, for example, that a mother-in-law who once resided with her son and daughter-in-law would be entitled to apply for a protection order under the Manitoba and Saskatchewan Acts if she were physically abused by the daughter-in-law after the two no longer resided together, but no such recourse would be available to her under Alberta's legislation.

While the Commission has concluded that Manitoba's and Saskatchewan's domestic violence Acts are preferable to Alberta's insofar as they protect a broader range of persons who may be subjected to domestic abuse, it nonetheless believes that protection under Manitoba's legislation ought to be further extended. As the population ages, the number of older adults requiring assistance in the home will grow. With an increasing circle of formal and informal, remunerated and non-remunerated service providers, opportunities for abuse and exploitation will increase. Care providers, as well as neighbours and relatives who have access to a person's residence, may subject the person to some form of domestic abuse, yet none of the Acts offer protection to a person who has been subjected to domestic abuse by a perpetrator who has access to the household but who is not a "cohabitant" (or "family member" or in a "family relationship" under Alberta's and Prince Edward Island's legislation, respectively).

The Commission is of the opinion that restricting protection from domestic violence to current and past cohabitants (and to the parents of a child, regardless of whether they have lived together) is unwarranted, and that entitlement to protection should more properly relate to the nature of a relationship within a household context. It therefore recommends that the *Domestic Violence and Stalking Prevention, Protection and Compensation Act* be amended to extend protection in respect of persons with easy and frequent access to another person's household, regardless of whether the persons are related to one another by blood, marriage, or shared responsibility for the care of children, or whether they reside or have resided with one another.

Minimally, protection should be extended to a much broader range of family members, regardless of whether the abuse occurs when the persons in question reside together or have ever resided together. Prince Edward Island's legislation extends protection to members of the same family, without any further restriction, *i.e.*, regardless of whether the family members have resided or are residing together.[27] (This means that while the physically abused mother-in-law in our previous example would not be entitled to apply for a protection order under Manitoba's or Saskatchewan's legislation if she had never resided with the abusive daughter-in-law, she would

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[25] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 1(d)(iii).

[26] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 1; *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 2(a)(I).

[27] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 1(d)(ii).

be entitled to make such an application under Prince Edward Island's legislation.) The same approach was adopted in England's *Family Law Act 1996*,[28] which entitles "associated persons" to apply for non-molestation orders. "Associated persons" is a broadly defined term that includes, among other persons, "certain relatives," which in turn encompasses a wide range of family relations, including a father, mother, stepfather, son, daughter, stepson, stepdaughter, grandmother, grandfather, grandson, and granddaughter of any person against whom a non-molestation order is sought (or of that person's spouse or former spouse).[29]

RECOMMENDATION 2

That the Act be amended by extending protection in respect of persons who have easy and frequent access to another person's household, regardless of whether the persons are related to one another by blood, marriage, or shared responsibility for the care of children, or whether they reside or have resided together.

(c) Applicants

With respect to who may apply for an emergency protection order, under Manitoba's legislation the applicant may be: the victim; a lawyer or peace officer, with the victim's consent;[30] an adult, on behalf of a minor;[31] or a committee appointed under *The Mental Health Act* or substitute decision maker appointed under *The Vulnerable Persons Living with a Mental Disability Act*.[32]

Under Saskatchewan's *Victims of Domestic Violence Act* an applicant for an emergency or Queen's Bench protection order may be: the victim; a member of a category of persons designated in the regulations, with the victim's consent;[33]and any other person on behalf of the victim, with leave of the court (in the case of a Queen's Bench order) or justice of the peace (in

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[28]*Family Law Act, 1996* (U.K.) 1996, c. 27.

[29]*Family Law Act, 1996* (U.K.) 1996, c. 27, s. 62.

[30]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 4(2).

[31]*Domestic Violence and Stalking Regulation*, Man. Reg. 117/99, s. 7(1).

[32]*Domestic Violence and Stalking Regulation*, Man. Reg. 117/99, s. 8.

[33]Included in this category are program co-ordinators of victim assistance programs, certain community case workers, and peace officers. See: *The Victims of Domestic Violence Regulations*, c. V-6.02, Sask. Reg. 1, s.3.

the case of an emergency protection order).[34] Alberta's legislation is effectively identical to Saskatchewan's in this regard.[35]

Prince Edward Island's Act differs from Saskatchewan's and Alberta's in two respects. First, it permits *any* person to apply for an emergency protection order with leave of the justice of the peace *only* if the victim is incapable of giving consent.[36] Second, it would appear that an application for a victim assistance order to the Supreme Court (the equivalent of a Queen's Bench protection order in the other jurisdictions) may only be made by the victim.[37] Manitoba's Act is curiously vague on this point, stating merely that the court may make a prevention order where it has determined, on application, that the respondent has stalked the subject or subjected him or her to domestic violence.[38]

All four provinces require an application for an emergency protection order by the victim to be made in person,[39] and in Saskatchewan, Alberta, and Prince Edward Island a person making the application on behalf of a victim must do so in person as well.[40] In Manitoba, lawyers and peace officers, and in Saskatchewan, Alberta and Prince Edward Island designated persons (set out in the respective regulations) may apply for an emergency protection order either in person or by telecommunication.[41]

The range of persons entitled to apply for a protection order under Manitoba's legislation is significantly narrower than the range of potential applicants under the other Acts. A competent adult who has been subjected to domestic abuse can only apply for an emergency protection order under Manitoba's Act in person or by way of a lawyer or peace officer. The Commission regards this limited range of options as a serious shortcoming. It seems self-evident that in certain circumstances retaining a lawyer or contacting the police will not be a feasible option. Equally self-evident is the wisdom of permitting certain persons, such as victim assistance program co-

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[34] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 8.

[35] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 6(1).

[36] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 4(6)(c).

[37] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 7.

[38] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 14(1).

[39] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 4(2)(a); *The Victims of Domestic Violence Regulations*, c. V-6.02, Sask. Reg. 1, s. 4(1)(a); *Protection Against Family Violence Regulation*, Alta. Reg. 80/99, s. 4(1)(a); *Victims of Family Violence Act Regulations*, P.E.I. EC558/96 s. 4(1)(a).

[40] *The Victims of Domestic Violence Regulations*, c. V-6.02, Sask. Reg. 1, s. 4(1)(b); *Protection Against Family Violence Regulation*, Alta. Reg. 80/99, s. 4(1)(b); *Victims of Family Violence Act Regulations*, P.E.I. EC558/96 s. 4(1)(b).

[41] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 4(2)(c); *The Victims of Domestic Violence Regulations*, c. V-6.02, Sask. Reg. 1, s. 4(2); *Protection Against Family Violence Regulation*, Alta. Reg. 80/99, s. 4(2); *Victims of Family Violence Act Regulations*, P.E.I. EC558/96 s. 4(2).

ordinators and social workers, to apply for a protection order on behalf of an abused person. As well, allowing a justice of the peace to permit any person to apply for a protection order on behalf of an abuse victim will enable a victim who might not be willing or able to apply for protection himself or herself to entrust the application to a friend or relative. These options are included in Saskatchewan's, Alberta's, and, to a lesser extent, Prince Edward Island's Acts, and the Commission is persuaded that in order to provide victims of abuse (and stalking) with adequate access to protection, similar options ought to be considered for inclusion in Manitoba's legislation. The Commission is also of the view that Manitoba's legislation ought to be amended to clarify who may apply to the Court of Queen's Bench for a prevention order, bearing in mind that the rationale for allowing other persons to apply for an emergency protection order on behalf of a victim would appear to apply equally to applications for a prevention order.

RECOMMENDATION 3

That the Act be amended by permitting a broader range of persons, including certain designated persons (such as social workers) and friends or relatives (with the permission of the designated justice of the peace or the court) to apply for orders on behalf of victims.

RECOMMENDATION 4

That the Act be amended to allow the same persons to apply for either a protection or a prevention order under the Act.

3. Protection Orders

Domestic violence legislation entitles victims of domestic violence (and, in Manitoba, of stalking) to apply for two types of protection orders, which generally may be characterized as emergency and non-emergency protection orders (discussed below).

(a) Emergency protection orders

An emergency protection order (so named in Alberta's and Prince Edward Island's legislation, and termed "protection order" in Manitoba and "emergency intervention order" in Saskatchewan) is designed to provide a victim of domestic abuse with immediate protection in urgent situations. As the rationale for emergency protection orders is to provide protection from imminent danger, each jurisdiction authorizes designated justices of the peace (generally more

accessible than the courts) to grant this type of order.[42] In Saskatchewan, for example, orders are available by telephone 24 hours a day, and all designated justices of the peace must carry cellular telephones at all times. (Calls are routed throughout the province on a random rotation basis, preventing local and potentially biased response.)[43] While all of the Acts implicitly contemplate a speedy hearing of the application, Saskatchewan's Act explicitly requires the hearing to be concluded within 24 hours of the application having been made.[44] In every case an emergency protection order may be granted without notice to the person against whom the order is sought,[45] and the order will bind that person once he or she has received notice of it.[46]

To obtain an emergency intervention order under Saskatchewan's Act, the applicant must establish that domestic violence has occurred and that because of seriousness or urgency the order should be made to ensure the immediate protection of the victim.[47] Alberta's and Prince Edward Island's Acts contain similar requirements.[48] An emergency intervention order under Saskatchewan's Act may include provisions that: grant the victim exclusive occupation of a residence (regardless of ownership); direct a peace officer to remove the perpetrator from the residence or to accompany the applicant to the residence to supervise the removal of personal belongings; restrain the perpetrator from communicating with or contacting the victim (and other specified persons); or are otherwise necessary for the immediate protection of the victim.[49] While the lists of specified provisions that may be included in an order under Alberta's and Prince Edward Island's Acts are considerably lengthier than Saskatchewan's list, in each case the discretion of the justice of the peace (or in Alberta, a judge of the Provincial Court) to include any provision he or she considers necessary in effect means that an emergency protection order issued

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[42]Under Alberta's legislation application for an emergency protection order may also be made to the Provincial Court, which Court is typically more accessible than the Court of Queen's Bench, particularly in rural areas. *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 2(1).

[43]Telephone conversation with R. McKendrick, Director, Family Violence Program, Saskatchewan Department of Justice (August, 1998).

[44]*The Victims of Domestic Violence Regulations*, c. V-6.02, Sask. Reg.1, s. 6.

[45]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 6(1); *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 3(1); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 2(1); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 4(1).

[46]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 17; *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 4(1); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 5(1); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 5(1).

[47]*Victims of Domestic Violence Act*, S.S. 1994 c. V-6.02, s. 3(1)

[48]*Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 2(1); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 4(1).

[49]*Victims of Domestic Violence Act*, S.S. 1994 c. V-6.02, s. 3(3).

pursuant to any of these Acts may contain provisions specified in any of the lists (and any other provision as well).[50]

In Manitoba, a designated justice of the peace may grant a protection order where he or she has determined (on a balance of probabilities) that the respondent is stalking the subject or subjecting him or her to domestic violence, and that the subject believes that the respondent will continue to engage in such conduct.[51] The discretion of the justice of the peace as to the content of protection orders is significantly narrower than it is under the other Acts inasmuch as section 7(1) of Manitoba's legislation confines a justice of the peace to a list of specified provisions, whereas the Saskatchewan, Alberta, and Prince Edward Island statutes authorize a justice of the peace to include in the order any other provision that he or she considers necessary.

Manitoba's Act is also unique in that its list of specified provisions that may form part of a protection order does not include a provision granting exclusive temporary occupation of the residence to the subject. An occupation order would appear to be central to securing immediate protection for a victim of domestic abuse (and his or her children and other dependants and intimates who comprise the household), perhaps particularly where the victim is a tenant at will and the perpetrator can demand eviction. Although the Court of Queen's Bench may include a provision granting sole occupation in a prevention order (which orders are issued in non-urgent situations, discussed below), such discretion has not been accorded to justices of the peace in emergency circumstances, where, arguably, there may be a greater need for it.

Similarly, although the Court of Queen's Bench has been given explicit discretion to grant either party temporary possession of specified personal property, including vehicles,[52] the comparable provision in respect of protection orders allows a justice of the peace to grant either party "... temporary possession of necessary personal effects ... ."[53] It is not clear whether vehicles would fall into the category of "personal effects". Given the potential importance of vehicles in day to day activities (vehicles are often required for transportation to and from work and for transporting children to childcare facilities, for example) the Commission is of the view that Manitoba's Act should be amended so as to clearly allow justices of the peace to grant temporary possession of a vehicle.

Manitoba's legislation differs from the other Acts in another noteworthy respect. Unlike the Saskatchewan, Alberta, and Prince Edward Island legislation, Manitoba's Act does not set out

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[50]For lists of specified provisions that may be included in an emergency protection order under Alberta's and Prince Edward Island's legislation, see: *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 2(3); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 4(3).

[51]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 6(1).

[52]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 14(1)(f).

[53]*The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 7(1)(e).

a list of factors that must be considered in determining whether an emergency protection order should be granted. Saskatchewan's *Victims of Domestic Violence Act*, for example, requires the justice of the peace to consider the following factors: the nature of the domestic violence; the history of such violence by the respondent towards the victim; the existence of immediate danger to persons or property; and the best interests of the victim and any child of the victim (or any child in the victim's care and custody).[54] While it is probable that a justice of the peace would have regard in any event to the first three of these factors, the best interests of a child who may be indirectly affected by the domestic violence (*i.e.*, who is not the primary victim) may not be an obvious consideration.

Finally, Manitoba's Act differs from the other legislation in that it does not require the issuing justice of the peace to specify a termination date for the emergency protection order. In Alberta, protection orders must specify a termination date no more than one year from the date of issuance.[55] Prince Edward Island's Act stipulates that no emergency protection order may exceed 90 days in duration.[56] The regulations under Saskatchewan's Act require the issuing justice of the peace to specify the date on which the order will expire.[57] Manitoba's failure to require time limits on orders may result in orders remaining in effect long after their efficacy has passed, leading both to administrative inefficiency and potential jeopardy to respondents whose subjection to the orders can no longer be justified.

Concerning emergency protection orders, then, the Commission has concluded that Manitoba's legislation would be improved by the adoption of a list of factors for consideration by justices of the peace to assist them in determining applications for orders. It is also of the opinion that the legislation ought to be further amended to provide justices of the peace with the discretion to respond to the particular circumstances of an application by including in orders any provision they consider necessary to provide for the immediate protection of the victim (or child of the victim). At the very least, because a secure residence is critical in domestic violence situations, the list of specified provisions should be revised by the addition of a provision that would allow justices of the peace to grant sole occupancy of the residence to the subject (regardless of ownership). Similarly, justices of the peace should have the option of granting temporary possession of a vehicle. Manitoba's list of specified provisions would also be improved by the addition of provisions relating to the temporary care and custody of a child and prohibiting the respondent from dealing with specified property, both of which are included in Prince Edward

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[54] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 3(2). Similar requirements are included in the Alberta and Prince Edward Island legislation. See: *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 2(2); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 4(2).

[55] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, ss. 7(1) and (2).

[56] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 4(4).

[57] *The Victims of Domestic Violence Regulations*, c. V-6.02, Reg. 1, Form A.

Island's Act.[58] Finally, the Commission is of the view that provision should be made in the regulations that the justice of the peace specify a date on which the emergency protection order will terminate unless extended by the Court of Queen's Bench, which date cannot exceed 90 days from the date of the order.

RECOMMENDATION 5

That the Act be amended to include a list of factors to assist justices of the peace in determining emergency protection orders (which list ought to include consideration of the best interests of any child of the victim).

RECOMMENDATION 6

That the Act be amended to provide designated justices of the peace and the Court of Queen's Bench with the means to respond appropriately to particular circumstances of domestic abuse by allowing for the inclusion in an order of any provision considered necessary. Minimally, the Act should enable justices of the peace to:
(a) grant sole occupancy of a residence;
(b) award temporary care and custody of a child;
(c) award temporary possession of a vehicle; and
(d) prohibit the respondent from dealing with specified property.

RECOMMENDATION 7

That the Act be amended to provide that justice of the peace be required to specify a date on which the emergency protection order will terminate, which date shall not exceed 90 days from the date of issue.

The inclusion of stalking in Manitoba's Act may have limited the range of provisions that can be included in emergency protection orders. While including stalking may be supportable on the basis that victims of stalking and victims of domestic violence share the same need for emergency protection, the fact that much stalking behaviour occurs outside the context of a domestic relationship suggests that responding to both types of circumstances will require special attention. Granting a subject sole occupancy of a home, for example, makes no sense in the context of a "stranger" stalking, but doing so in the context of domestic violence or stalking by a former cohabitant who may have ownership rights in the home makes eminent sense. Narrowing the ambit of protection for victims of domestic abuse or of stalking by former partners because some remedial measures may not be appropriate to cases of stalking by a stranger may cause injustice to such victims and their children. This problem would be resolved by providing justices

[58] *Victims of Family Violence Act*, R.S.P.E.I. 1988, C. V-3.2, s. 4(3)(f) and (h).

of the peace with the discretion to include in their protection orders any provision considered necessary for the protection of the subject or the subject's children, or, alternatively, by expanding the list of provisions that may be included in such orders, both of which options have been discussed above.

RECOMMENDATION 8

That the Act be amended to provide that justices of the peace may include provisions in an emergency protection order necessary or advisable for the immediate protection of the subject or the subject's children.

(b) Queen's Bench protection orders

All of the domestic violence Acts provide for a second type of protection order, termed a "prevention order" in Manitoba, a "victims assistance order" in Saskatchewan, a "Queen's Bench protection order" in Alberta, and "victim assistance order" in Prince Edward Island. This type of protection order is aimed at preventing future violence, ameliorating damage caused by past violence (by, for example, compensating the victim for monetary loss suffered as a result of the abuse), and providing other appropriate assistance to the victim. The procedure for obtaining these orders is by application to the Court of Queen's Bench (the Trial Division of the Supreme Court in Prince Edward Island). Making an application to the court is not as expeditious as the procedure for obtaining an emergency protection order, and the legislation contemplates that such Queen's Bench orders will be sought in situations where, although there is a need for protection, the circumstances are not urgent, and a more thoroughly considered judicial response to the abuse (or stalking) is desired.

As for the contents of Queen's Bench protection orders (which reference will also encompass the equivalent orders of the Trial Division of the Supreme Court under Prince Edward Island's legislation throughout this Chapter), all four Acts contain a similar, relatively long list of provisions that may be included in the order.[99] Under Alberta's *Protection Against Family Violence Act*, for example, the court may: restrain a respondent from attending or entering any specified place that is attended regularly by the claimant or other family members, or from contacting the claimant or subjecting the claimant to family violence; grant the claimant exclusive occupation of the residence; require the respondent to reimburse the claimant for monetary losses suffered by the claimant (and any child of the claimant), including expenses such as loss of earnings, medical and dental expenses, and moving and accommodation expenses; grant either party temporary possession of specified personal property, such as a vehicle, cheque-book, and medical insurance cards; restrain either party from dealing in any manner with property in which

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[99] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 14(1); *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 4(2); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 7(1).

the other party may have an interest; restrain the respondent from making any communication that is likely to annoy or alarm the claimant, including communication with the claimant or other family members (or their employers, employees, co-workers, or other specified persons); direct a police officer to remove a respondent from a residence, or to accompany a specified person to a residence to supervise the removal of personal belongings; require the respondent to post a bond to secure compliance with the order; require the respondent or any other family member to receive counselling; or direct the seizure of weapons that have been used (or threatened to be used) in the violence. As well, the court may include in the order any other provision it considers appropriate.[60]

While the lists of specified provisions that may be included in Queen's Bench protection orders are similar, certain discrepancies merit discussion. First, and most significantly, while the Saskatchewan, Alberta, and Prince Edward Island legislation all permit the inclusion of any provision the court considers appropriate in the order,[61] no such discretion has been granted to the court under Manitoba's legislation. As discussed earlier in the context of emergency protection orders, the Commission is of the view that restricting the contents of protection orders (be they emergency or Queen's Bench protection orders) to a list of specific provisions may result in orders that do not respond fully to individual circumstances. Consequently, the Commission continues to prefer the approach adopted by Saskatchewan, Alberta, and Prince Edward Island.

Second, while Manitoba's Act allows the court to order compensation for monetary losses suffered by the subject of abuse (or stalking),[62] Saskatchewan's legislation provides further that the court may order compensation to be paid to the victim for monetary losses suffered not only by the victim, but by any child of the victim (or any child that is in the care or custody of the victim) as a result of the domestic violence.[63] Alberta's legislation contains a similar provision,[64] and although Prince Edward Island's legislation does not address the issue of compensation, such a provision could be included in an order by virtue of the discretion given to judges to include in an order any provision he or she considers appropriate.[65] While none of Manitoba's, Saskatchewan's, or Alberta's Acts state explicitly that a victim may be compensated for costs incurred on behalf of a child (bearing in mind that children may be severely affected by family violence involving adults even though they are not the direct target of abuse), such compensation is implicit in the courts' discretion to order compensation in respect of, for example, in Manitoba's

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[60] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 4(2).

[61] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(k); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 4(2)(m); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 4(3)(k).

[62] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 14(1)(j).

[63] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(f).

[64] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 4(2)(d).

[65] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 7(1)(c).

case, *any* monetary loss suffered by the subject. However, Manitoba's Act differs from Saskatchewan's and Alberta's in that it does not specify that compensation may be ordered for monetary losses suffered by a child. Given that children who are not the primary target of abuse may incur costs that have not been borne by the primary victim (a teenage child may have used his or her own money to move out of the family home, for example), the Commission is persuaded that Manitoba's legislation would be improved by an amendment permitting the court to order compensation in respect of monetary losses suffered by any child of the primary victim, and, further, that such compensation should be payable directly to the child.

RECOMMENDATION 9

That the Act be amended so as to better meet the needs of, and provide greater protection for, children by providing for direct compensation payable to any child of the subject (or in the care and custody of the subject) for any monetary loss suffered by the child as a result of the domestic violence or stalking, and that the protection afforded by publication bans ought to be available if publication would not be in the best interests of any child of the subject.

It is appropriate at this point to note that this lack of sustained focus on the best interests and protection of children is perhaps most evident in the meaning ascribed to "stalking". As noted earlier, stalking is essentially defined as occurring when a person repeatedly engages in conduct that causes another person to fear for *his or her own safety*.[66] "Stalking" apparently does not encompass situations where the primary victim does not fear for his or her own safety, but for someone *else's* safety. This is particularly curious in view of the Act's examples of conduct that constitutes stalking, which include: following or communicating with or contacting the primary victim *or anyone known to that person*; besetting or watching any place where the primary victim, *or anyone known to that person*, resides, works, carries on business or happens to be; and engaging in threatening conduct directed at the victim *or anyone known to the victim*.[67] These examples acknowledge that certain conduct directed towards persons known by the primary victim, such as children, new partners, friends, relatives, and co-workers, amount to stalking, yet, inconsistently, fear on the part of primary victim for those persons' safety does not entitle the primary victim to apply for a protection order. As noted in our earlier Report on *Stalking*,[68] we remain of the view that, for example, a parent who is being stalked in order to discover the whereabouts of a child should be entitled to apply for a protection order even if it is not his or her own safety with which he or she is concerned, but the child's. We therefore recommend that the meaning of stalking be amended to include fear for the safety of another person.

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[66] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 2(2).

[67] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 2(3).

[68] Manitoba Law Reform Commission, *supra* n. 5, at 61.

RECOMMENDATION 10

That the Act be amended to permit the granting of a protection order or a prevention order to an applicant who fears for the safety of someone known to him or her, rather than for his or her own safety.

The best interests of children are also ignored in the context of publication bans, which are of major importance in the volatile circumstances of domestic violence and stalking. Under Manitoba's legislation the court may ban the publication of the names (or other identifying information) of a subject or witness involved in a proceeding relating to an application for an order in media reports if the court is "satisfied that the publication or broadcast could endanger the safety or well being of the subject or witness".[69] This differs from the other three Acts, all of which allow the court to prohibit publication on the basis of the impact it would have on the victim *and* any child of the victim.[70] Under Alberta's Act, for example, the judge may prohibit publication if the judge believes that publication "would have an adverse effect on or cause undue hardship to the claimant or respondent or any child of the claimant or respondent."[71]

Recognizing that publication of a proceeding relating to an application for a protection or prevention order under Manitoba's Act, even if not endangering the safety or well being of the victim, may have serious repercussions on a child of the victim, the Commission is persuaded that Manitoba's legislation ought to be amended to extend to children the protection afforded by publication bans.

Finally, under Manitoba's Act, the court may only *recommend* that the *respondent* receive counselling or therapy.[72] While Saskatchewan's Act includes the same provision,[73] presumably the court could require a respondent or other cohabitant to receive counselling through the exercise of its discretion to include in the order any provision it considers appropriate. This would also be the case under Prince Edward Island's Act, which, although it does not address the issue of counselling in its list of provisions that may be included in an order, does provide the judge with the discretion to include any provision he or she considers appropriate.[74] ***Requiring*** a respondent to obtain counselling may be a more effective option, and the Commission therefore recommends

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[69] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 21(1).

[70] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 9(3); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 8(3); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 11(3).

[71] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 8(3).

[72] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 14(1)(m).

[73] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 7(1)(l).

[74] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 7(1)(e).

that consideration be given to an amendment that would explicitly furnish the court with this option.

RECOMMENDATION 11

That the Act be amended to allow the Court to require that the respondent receive counselling, as opposed to recommending that he or she do so.

4. Warrants Permitting Entry

Unlike Manitoba's legislation, Saskatchewan's and Alberta's Acts permit peace officers[75] to apply for a warrant permitting entry where, based on information on oath, there are reasonable grounds to believe that the person who provided the information has been refused access to a cohabitant ("family member" under Alberta's legislation) and that the cohabitant may be a victim of domestic abuse and will be found at the place to be searched.[76] Generally, warrants of entry authorize peace officers to enter the premises, assist or examine the cohabitant,[77] and remove the cohabitant from the premises in order to assist or examine him or her.[78] Significantly, Saskatchewan's legislation allows the peace officer to remove the cohabitant without his or her consent, whereas in Alberta the family member may only be removed *with* his or her consent.

Unlike the comprehensive adult protection regimes discussed in Chapter 4, neither of the Saskatchewan or Alberta Acts provides for emergency entry without a warrant. The Commission is convinced of the utility of a provision allowing a peace officer who has obtained a warrant to enter premises where information on oath establishes that there is reason to believe that someone is being abused and access to that person has been denied. It prefers Alberta's legislation in this regard inasmuch as it balances the need for protection, by permitting entry without consent, with the individual's right to self-determination, by providing for removal of a family member only with that person's consent.

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[75]Both Acts permit "a person designated in the regulations" to apply for a warrant, and in each case only peace officers have been so designated. *The Victims of Domestic Violence Regulations*, c. V-6.02, Sask. Reg. 1, s. 20(1); *Protection Against Family Violence Regulation*, Alta. Reg. 80/99, s. 11(1).

[76]*The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 11(1); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 10(1). Prince Edward Island's *Victims of Family Violence Act* does not contain a comparable provision, perhaps because its *Adult Protection Act* permits emergency intervention without consent or a court order (as discussed in Chapter 4).

[77]*The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 11(2)(a) and (b); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 10(2)(a) and (b). Section 11(2)(c) of Saskatchewan's Act also permits the peace officer to remove anything that may provide evidence of the domestic abuse.

[78]*The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 11(3); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 10(2)(c).

RECOMMENDATION 12

That the Act be amended to permit a peace officer to enter premises, with a warrant, in circumstances where information on oath has established that there is reason to believe that someone is being abused and access to that person has been denied.

5. Filing and Confirmation

All four domestic violence Acts require a justice of the peace (or a judge of the Provincial Court in Alberta) who has granted an emergency protection order to forward a copy of it, and any document submitted in support of the application for the order, to the Court of Queen's Bench (or the Trial Division of the Supreme Court in Prince Edward Island).[79] Under Manitoba's legislation the order and documents are filed in the court, and upon filing the order becomes an order of the Court of Queen's Bench and is enforceable as such.[80] In Saskatchewan, Alberta, and Prince Edward Island an emergency protection order must be reviewed and confirmed before it becomes an order of the Court of Queen's Bench (or the Supreme Court in Prince Edward Island).[81] In Saskatchewan the order must be reviewed in chambers within three working days (or as soon as a judge can be made available after that period), and if the evidence supports the granting of the order the judge must confirm the order,[82] after which it becomes an order of the Court of Queen's Bench.[83] If the order is not confirmed, the judge must direct a rehearing of the matter,[84] at which the respondent is required to appear and the victim may appear.[85] (If the respondent fails to attend the rehearing, the order may be confirmed in the respondent's absence.[86]) At the rehearing the person against whom the order was made must show on a balance of probabilities why the order

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[79] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 10(1); *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(1); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 3(1); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 6(1).

[80] *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*, C.C.S.M. c. D93, s. 10(2).

[81] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(3); *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 3(4)(c); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 6(2).

[82] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(2). In the year preceding March 31, 1997, 38 of 331 emergency intervention orders issued in Saskatchewan were not confirmed by the Court of Queen's Bench. The major reason for non-confirmation was insufficient evidence of urgent circumstances. R. McKendrick, Director, Family Violence Program, Saskatchewan Department of Justice, citing a 1997 evaluation of the Act.

[83] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(3).

[84] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(4).

[85] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(5).

[86] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(8).

should not be confirmed.[87] Ultimately, the order may be confirmed, terminated, or varied at the rehearing.[88] The rehearing process is similar under Prince Edward Island's *Victims of Family Violence Act*, although it requires applicants to attend the rehearing,[89] allows the Court to issue a subpoena to the victim,[90] and states explicitly that the respondent is entitled to be heard and to examine and cross-examine witnesses at the rehearing.[91]

Under Alberta's *Protection Against Family Violence Act*, every emergency protection order must indicate the date, time, and place for its review at a hearing by a justice of the Court of Queen's Bench, which date must be no later than seven working days after the granting of the order.[92] The hearing must be based on affidavit and any other sworn evidence, and any evidence in support of the order may also be considered at the hearing.[93] At the hearing the court may revoke the order, direct that an oral hearing be held, confirm the order, in which case the order becomes an order of the Court of Queen's Bench, or revoke the order and grant a Queen's Bench protection order (discussed above).[94]

In summary, under Manitoba's legislation a protection order issued by a designated justice of the peace becomes an order of the Court of Queen's Bench by the mere act of filing, whereas under Saskatchewan's, Alberta's, and Prince Edward Island's legislation such orders must be confirmed by the Court of Queen's Bench (the Supreme Court in Prince Edward Island's case) before becoming an order of that Court. In each case, the process raises several constitutional issues.

C. CONSTITUTIONAL ISSUES

The Manitoba, Saskatchewan, Alberta, and Prince Edward Island Acts, insofar as they provide for emergency protection orders, are arguably open to constitutional challenge on three

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[87] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(7).

[88] *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 5(9).

[89] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 6(4)(d).

[90] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 6(9).

[91] *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 6(8).

[92] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 2(6).

[93] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 3(2) and (3).

[94] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 3(4).

grounds.[95] First, they may confer on provincially-appointed authorities (*i.e.*, justices of the peace or, in the case of Alberta, the Provincial Court) judicial powers that can only be constitutionally exercised by superior, district, or county court judges appointed under section 96 of the *Constitution Act, 1867*.[96] Second, some of the powers granted by the legislation may violate rights guaranteed by the *Canadian Charter of Rights and Freedoms*.[97] Finally, some of the powers in question may relate, in "pith and substance," to criminal law, jurisdiction over which is reserved exclusively to the federal government by section 91(27) of the *Constitution Act, 1867*.[98]

1. Section 96

With respect to the section 96 argument, all of the domestic violence Acts grant powers to justices of the peace (or, in the case of Alberta, to Provincial Court judges) that are analogous to powers typically exercised by superior courts, particularly those that relate to the issuance of injunctions and orders dealing with rights concerning possession of property. Section 96 has been interpreted by the courts to mean that judicial functions that were exercised *exclusively* by superior, district, or county courts in 1867 cannot be conferred on any provincially-appointed judge or tribunal.[99]

Two compelling arguments support the view that the powers conferred on provincially appointed officials by the domestic violence Acts do not infringe section 96. First, these powers are similar to those exercised by justices of the peace in 1867, at which time justices of the peace exercised the power to bind over citizens to be of good behaviour and keep the peace. (The warrant of entry has been in their purview since before Confederation as well.) Second, legislation dealing with family violence as a discrete social problem did not exist in 1867. This being the case, judicial functions relating specifically to family violence were not exercised by superior, district, or county courts at that date, which supports the argument that provincially appointed officers are not prohibited from exercising these functions.

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[95] These comments are based in large part on the analysis undertaken by Dale Gibson Associates, "Defusing Domestic Violence: Section 96 Hurdles," Schedule A to the Schulman Report, *supra* n. 6.

[96] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[97] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

[98] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

[99] *Reference re: Act to Amend Chapter 401 of the Revised Statutes, 1989, the Residential Tenancies Act (N.S.), ss.7, 8(2)* (1996), 131 D.L.R. (4th) 609 (S.C.C.), (sub nom. *Reference re Amendments to the Residential Tenancies Act*), [1996] 1 S.C.R. 186.

In any event, justices of the peace may be given new powers as long as superior courts are not deprived of concurrent jurisdiction.[100] The Saskatchewan, Alberta, and Prince Edward Island Acts grant the superior courts concurrent and over-riding jurisdiction through the requirement that they confirm emergency protection orders within a set period of time. The power of the justice of the peace is thus interim only.

In sum,

> ...even if s. 96 did raise significant constitutional obstacles to the enactment of family violence legislation along the lines of that in place in Saskatchewan and P.E.I., the required superior court confirmation procedures established in those statutes would overcome those obstacles.[101]

Manitoba's Act, however, does not require orders to be reviewed and confirmed by a superior court. Rather, it attempts to create concurrent jurisdiction merely by the fact of filing. Review is qualitatively different from filing, in that it requires a superior court to assess fairness on the basis of supporting documents and the nature of the order made and to confirm the order. (Confirmation has a practical aspect as well, in that it signals to the perpetrator that the order has been reviewed and upheld once by the court, which may assist in assessing the merit of an application to the court for a review of the order.) By not requiring confirmation of orders issued by justices of the peace, the constitutionality of this aspect of Manitoba's legislation is highly questionable.

All of the domestic violence Acts under consideration may be problematic with respect to their provisions dealing with access to property. The constitutionality of those aspects of Prince Edward Island's Act that conferred the right to make orders regarding occupation of the family home on justices of the peace was challenged in *C. (A.L.G.)* v. *Prince Edward Island*,[102] on the basis that provincially appointed bodies were not permitted to adjudicate regarding property rights (that jurisdiction falling under the domain of section 96 judges). The Court held that the legislation conformed to the requirements of section 96, but only with a significant qualification:

> Should the enabling provisions of the *Act* be interpreted or employed to authorize an overbroad exercise of power by a justice of the peace, either by creating an emergency order which intrudes more than necessary upon the proprietary rights of a respondent or extends for a longer duration than necessary, then the constitutional validity of the

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[100]See, *e.g.*, *MacMillan Bloedel Ltd.* v. *Simpson*, [1995] 4 S.C.R. 725, (1995), 130 D.L.R. (4th) 385 (S.C.C.).

[101]Dale Gibson Associates, *supra* n. 95, at 172.

[102]*C. (A.L.G.)* v. *Prince Edward Island*, (1998), 157 D.L.R. (4th) 523 (P.E.I.S.C. T.D.).

> legislation would come into doubt. Then, in my view, the legislation would be, at best, on shaky constitutional ground.[103]

On the issue of property rights, the Alberta Law Reform Institute suggested that the provisions relating to property rights in its recommended legislation did not infringe section 96 because their primary purpose was the prevention of abuse, and as such they were not primarily about property rights. "On that basis, we may still contend ... that this means of preventing abusive behaviour is analogous to the common law powers of justices to require persons to keep the peace and be of good behaviour."[104] The Court in *C. (A.L.G.)* apparently took a different view of the matter, however, with the result that the constitutionality of provisions dealing with rights of occupancy of a residence, or other property rights, may be questionable unless they conform with the requirements set out in that case. Specifically, they must be very limited in time, to only the length of time required to deal with the urgent situation giving rise to the order.[105]

2. *Charter* Rights

The second basis of constitutional challenge concerns the potential denial of rights guaranteed by the *Charter of Rights and Freedoms*.[106] Granting orders restricting a respondent's freedom without a hearing at which the respondent is represented, and placing the burden of proof at a rehearing on the person against whom the order is made, for example, are *prima facie* infringements of section 7 of the *Charter*, which prohibits depriving an individual of his or her liberty except in accordance with the principles of fundamental justice.

The *Charter* issue was considered by Gibson and Khullar in 1997 in connection with Saskatchewan's and Prince Edward Island's legislation.[107] The authors concluded that while there is clearly room for *Charter* challenges with respect to emergency protection orders, such provisions are probably not *in and of themselves* contrary to the *Charter*:

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[103] *Id.*, at 550.

[104] Alberta Law Reform Institute, *Protection Against Domestic Abuse* (Report #74, 1997) at 44.

[105] *C. (A.L.G.)* v. *Prince Edward Island*, *supra* n. 102, at 551-552.

[106] *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

[107] Dale Gibson Associates, *supra* n. 95, at 175-186.

> In Canada, the key issue is that fair procedures be used in issuing these orders, and that the orders be carefully framed to minimally intrude on a person's liberty at the same time as protecting the interests that need to be protected.[108]

Gibson and Khullar suggest that even if certain provisions of domestic violence legislation are *prima facie* breaches of section 7 of the *Charter*, as long as they are procedurally fair they would probably be held to be justified under section 1 as "reasonable limit[s] ... in a free and democratic society."[109] On this point, in 1998, the Supreme Court of Prince Edward Island held in *C. (A.L.G.)* that:

> the provisions of [that province's] Act regarding emergency protection orders which govern notice to a respondent and opportunity to be heard violate the principles of natural justice and procedural fairness found in s. 7 of the *Charter*, and the associated deprivation of rights is not a justified limit in a free and democratic society under s. 1 of the *Charter*.[110]

Prince Edward Island's *Victims of Family Violence Act* provides for the review of emergency protection orders by a judge of the Supreme Court, who would confirm, vary, or revoke the order simply on the basis of the evidence that was before the justice of the peace.[111] The Court held that because this process resulted in an order of the Court without the respondent having been given clear notice either that the process was taking place or that he or she had the right to initiate a judicial review of the order, the respondent's section 7 rights had been infringed.[112] The Court further held that the respondent's rights were also infringed by the provision that stipulated that once a rehearing was either ordered by the reviewing judge, or requested by the respondent, the Court was entitled to consider evidence from the original application without the respondent having the right to cross-examine the applicant or other witnesses.[113]

Prince Edward Island's legislation was subsequently amended to address the concerns raised by the Court in *C. (A.L.G.)*.[114] Manitoba's, Saskatchewan's, and Alberta's Acts may be vulnerable on similar grounds, however, only because they do not require that, on a rehearing or application to set aside a protection order, the respondent be permitted to cross-examine the

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[108]Dale Gibson Associates, *supra* n. 95, at 186.

[109]Dale Gibson Associates, *supra* n. 95, at 136.

[110]*C. (A.L.G.)* v. *Prince Edward Island*, *supra* n. 102, at 544.

[111]*Victims of Family Violence Act*, R.S.P.E.I. 1988, c. V-3.2, s. 6.

[112]*C. (A.L.G.)* v. *Prince Edward Island*, *supra* n. 102, at 545.

[113]*C. (A.L.G.)* v. *Prince Edward Island*, *supra* n. 102, at 546.

[114]*An Act to Amend the Victims of Family Violence Act*, S.P.E.I. 1998, c. 11.

applicant or other witnesses, or otherwise test the evidence that was before the issuing justice.[115] Further Manitoba's Act does not explicitly permit the respondent to call additional evidence on a rehearing or application to set aside a protection order. The Commission is of the opinion that such permission should be granted by the legislation.

An additional concern is raised by the fact that under the Manitoba Act the justice of the peace need only be satisfied that "the *subject believes* that the respondent will continue the domestic violence or stalking" in order to issue a protection order.[116] This subjective standard is unique to the Manitoba legislation: Alberta, Saskatchewan, and Prince Edward Island all require that the issuing justice of the peace be satisfied that an objective assessment of the urgency or seriousness of the situation justifies the issuance of a protection order.[117] Manitoba's provision may be acceptable in the context of an urgent situation, but unless a more objective determination is made within a reasonably short period, the *Charter* rights of the respondent may be unacceptably infringed. The Commission is therefore of the opinion that when protection orders issued by justices of the peace are reviewed by a judge of the Court of Queen's Bench (as has been recommended elsewhere), the reviewing judge should be required to find that the urgency or seriousness of the circumstances warrants the continuation of the order.

The Court in *C. (A.L.G.)* was also asked to find the Prince Edward Island legislation in violation of the *Charter* on several other grounds, including that: the definition of "violence" was overbroad; the statutory standard of proof for the issuance of an order was too low; the powers conferred on justices of the peace were overbroad; and the fact that an order was not stayed when a rehearing was ordered by the reviewing judge did not accord with the principles of fundamental justice. The Court found that none of those grounds constituted a breach of the respondent's *Charter* rights.

3. Division of Powers

The final potential ground of constitutional challenge relates to the division of powers between the federal and provincial governments. Section 91(27) of the *Constitution Act, 1867*[118]

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[115] Alberta's Act may also be vulnerable because it does not clearly require the respondent to be informed of his or her right to request a review of the order.

[116] *The Domestic Violence and Stalking Prevention, Protection and Compensation and Consequential Amendments Act*, S.M. 1998, c. 41, s. 6(1).

[117] *Protection Against Family Violence Act*, S.A. 1998, c. P-19.2, s. 2(1)(b); *The Victims of Domestic Violence Act*, S.S. 1994, c. V-6.02, s. 3(1)(b); *Victims of Family Violence Act*, R.S.P.E.I. 1988, c.V-3.2, s. 4(1)(b).

[118] *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(27).

grants exclusive jurisdiction to make criminal law to the federal government, and provinces cannot enact legislation in areas traditionally falling under federal jurisdiction.[119]

Domestic violence legislation addresses behaviour that could be construed as falling under federal jurisdiction over criminal law, including behaviour such as assault, fraud, theft, deprivation of the necessities of life, property damage, threats, and the like. However, with the exception of Prince Edward Island's *Victims of Family Violence Act*, the legislation is entirely preventive rather than penal in nature. It neither creates offences nor denounces particular conduct, nor does it provide new penalties for any particular conduct. Although it does restrict the liberty of persons against whom an order is made, "a restriction on liberty is not necessarily punishment".[120] The legislation is centrally concerned with matters that do fall under provincial jurisdiction under section 92 of the *Constitution Act, 1867*, namely, "property and civil rights" and "local and private matters" (such as property damage, protection of the person, and occupation of the residence).

It would appear likely that the field occupied by domestic violence legislation is one that overlaps federal and provincial jurisdiction. Provincial legislation is permitted in areas of jurisdictional overlap unless and until Parliament enacts legislation of a similar kind that is expressly or impliedly inconsistent.[121] If the field is defined as "family violence intervention," Parliament has enacted no such legislation, leaving it open to the provinces to do so. On this point Gibson concludes that:

> [a]lthough the matter is not entirely free from doubt, it is our opinion that provincial family violence legislation of the type enacted by Saskatchewan and P.E.I. falls within provincial jurisdiction.[122]

The division of powers issue was also considered by the Court in *C. (A.L.G.)*.[123] In that case the Court held that the emergency protection order provisions of Prince Edward Island's Act did not impinge on the federal government's jurisdiction over criminal law. The Court stated:

> The relevant purpose of the *Act* is to provide protection for victims of family violence. The purpose of the *Criminal Code* of Canada is to define criminal activity and set punishment for such activity. ... In my view, the true purpose of the Act is the object stated in s. 3 thereof, namely, *to reduce and prevent family violence and to facilitate legal*

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[119]See, e.g., *Toronto Electric Commissioners* v. *Snider*, [1925] 2 D.L.R. 5 (P.C.).

[120]*R.* v. *Budreo* (1996), 45 C.R. (4th) 13 (Ont. C. Gen. Div.), 104 C.C.C. (3d) 245.

[121]*Attorney-General for Ontario* v. *Attorney General for the Dominion*, [1896] A.C. 348 (P.C.).

[122]Dale Gibson Associates, *supra* n. 95, at 190.

[123]*C. (A.L.G.)* v. *Prince Edward Island*, *supra* n. 102, at 540-541.

> *protection for victims by providing speedy civil remedies*. ... The purpose of the *Act* is not to affix criminal responsibility to a particular individual.[124]

Regarding the division of powers issue, it would appear that the domestic violence Acts of Manitoba, Saskatchewan, Alberta and Prince Edward Island are valid provincial legislation to the extent that they do not infringe the federal jurisdiction over criminal law. However, with respect to Manitoba's legislation, the question remains whether the mere act of filing is sufficient to overcome any constitutional challenge. The Commission therefore believes that, out of an abundance of caution and to avoid the possibility of having the legislation struck down, orders should be confirmed by the Court of Queen's Bench as is provided for in the Alberta, Prince Edward Island and Saskatchewan legislation.

RECOMMENDATION 13

That the Act be amended to require that protection orders be reviewed and confirmed, varied or revoked by a judge of the Court of Queen's Bench within 7 days of receipt of the order and all supporting documentation by the court.

RECOMMENDATION 14

That the Act be amended to permit a respondent, on a rehearing or application, to set aside a protection order, to call additional evidence, to cross-examine the applicant or other witnesses, and otherwise to test the evidence that was before the issuing justice.

RECOMMENDATION 15

That the Act be amended to provide that on reviewing an emergency protection order, or on an application to set aside such an order, the Court of Queen's Bench be required to determine whether the seriousness or urgency of the situation justifies the confirmation or continuation of the order.

D. POLICE RESPONSE AND ENFORCEMENT OF ORDERS

1. Introduction

Although other investigative agencies exist, the primary responsibility for investigating and responding to incidents of domestic violence belongs to the police. This has several

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[124]C. (A.L.G.) v. *Prince Edward Island*, *supra* n. 102, at 540 [emphasis in original].

advantages over response by other agencies, including that police powers are widely recognized and the constitutional limits on their authority are well understood. For example, police may enter a residence with an appropriate warrant, or without one if they have reasonable grounds to believe a criminal offence is occurring, and they may enter, investigate, and search premises (within limits), and arrest and remove an offender. In addition to these advantages, police officers have sole responsibility for enforcing the great variety of protection orders available in Manitoba.

The effective enforcement of these protection orders, and of the criminal law generally, is the primary guarantee of the safety of vulnerable persons. Unfortunately, effective enforcement of such orders in Manitoba is currently hampered for several reasons.

2. Zero Tolerance and Vulnerable Victims

Manitoba's policing and prosecution policies governing domestic violence apply to women, children, persons with disabilities, and older adults. The phrase *"zero tolerance"* was given to these policies in 1990 by then Minister of Justice James McCrae. To the extent that such slogans signal a commitment to enlightened reform, alert members of the public to the problem of domestic abuse, and encourage reporting and self-reporting, they serve a useful function. For the most part, however, they are not useful, and they can in fact be counter-productive.

No system of justice can function without some degree of discretion. In the criminal justice system, discretion is exercised at all stages, including reporting, policing, investigation, the laying of charges, the issuance of protection orders, prosecution, bail applications, plea bargaining, trial, and sentencing. Judges, who cannot be bound by governmental policy, exercise the ultimate discretion; prosecution is not the appropriate remedy for every incident of domestic violence. "Zero tolerance" promises that even the slightest episode of domestic violence will be punished. When this does not occur, or when an accused is released on bail and subsequently commits a serious offence, or when a no-contact order is breached, too often media and public criticism cause the various agencies involved to engage in a fault finding exercise, which does little to advance the overall agenda. Media accounts disclose the public's impossible expectation that the zero tolerance policy will prevent every known perpetrator from offending again, which in turn erodes public confidence in the officials and institutions which are meant to respond effectively to the problem of domestic abuse.

At any rate, the zero tolerance policy has had little impact on the prosecution of cases of elder abuse in Manitoba. The number of such cases prosecuted is effectively nil, likely due to a number of factors. For example, the perpetrator will often be elderly, and that fact, and concomitant health concerns, may deter prosecution. Few police officers or judges, knowing that correctional facilities make few concessions to elderly inmates, relish the prospect of exacerbating an elderly person's ill health, which may ultimately shorten that person's life. Furthermore, rehabilitation, which is a major goal of sentencing, may seem almost irrelevant at a late stage in a perpetrator's life.

In addition, and perhaps most importantly, not all victims of elder abuse want the problem solved through the criminal process, and therefore not all are prepared to co-operate with the police. Perhaps more than other groups, older adults place a high value on autonomy and self-determination. Any response to their situation that is patronizing or trivializing may lead them to reject all assistance, despite the fact that the abuse or neglect may continue. A senior police officer[125] has observed:

> Zero tolerance is particularly problematic respecting older adults who cherish more than most other things in life their ability to self determine in their latter years. ...[U]nless and until victims have a true understanding of and comfort level with the process, they will resist at every opportunity attempts to load them into the criminal justice continuum. The slightest hint of indifference on the part of those intervening on these victims' behalf will "turn them off", in many cases, permanently, despite ongoing victimization.

Whether or not the victim makes a criminal complaint, it is clear that agencies other than the police must be involved in the response in order to ensure a degree of continued support for the victim. The success of a domestic abuse response policy must be measured in terms of abatement of the problem. If a victim is reluctant to involve the criminal process, even to the limited extent of obtaining a protection order because it necessarily requires naming a perpetrator, informal services provided by other agencies become critically important. Insight into the dynamics of abuse may not only aid police involvement, but may also present options outside the criminal process to vulnerable adults who are unwilling to deal with the problem in a criminal context.

In Edmonton, a Vulnerable Persons Investigation Unit has been developed to assist vulnerable victims.[126] Auxiliary Domestic Abuse Prevention Teams (ADAPT) form part of the Unit, and include senior police and social workers who monitor high-risk cases to ensure resolutions that provide long-term benefits, including the settlement of legal issues and the safety and health of victims. The use of special police units to respond to domestic calls and follow-up teams comprised of police officers and social workers is intended to enhance victim choices, protection, and overall quality of life.

In order for this type of collaboration to be successful, each of the professions involved must retain its own ethos. Without this, nothing will have been added to police response. Social workers and counsellors who make up the Team, even though associated with the police service, must ensure that they do not adopt the powerful institutional police ethos, otherwise their particular strengths and the alternatives they bring to victims may be compromised. This can be accomplished by rotating social workers in and out of the special teams, or by establishing a

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[125]Letter from Inspector Ken Biener, Winnipeg Police Services (March 31, 1999).

[126]Schulman Report, *supra* n. 6, at 27-28..

special unit at arms length from the police service itself. Such institutional separation will help ensure that the standards and ethics and advantages of each profession are maintained at all times, and therefore that victims will receive the best possible service.

The Schulman Report recommended that Winnipeg Police Services establish a program similar to Edmonton's Vulnerable Persons Investigation Unit.[127] In response, Winnipeg Police Services approved the establishment of a Vulnerable Persons Unit (within its Youth Division) to be established in 1999. The Unit will specialize in the investigation and multi-disciplinary case management of child abuse, high-risk partner abuse, elder abuse, and abuse of the disabled.[128] (The Youth Division already investigates allegations of elder abuse and abuse of the disabled.) Establishment of the Unit will permit consultation with a wide range of professionals and provide a co-ordinated response to all cases of chronic abuse, which, it is hoped, will better meet victims' needs for support and intervention, whether or not criminal prosecution occurs. Such units would be equally desirable in other Manitoba centres.

3. Orders and Enforcement

Court orders issued in domestic violence cases generally address two primary concerns, namely, regulating the occupation of the family home when a relationship has broken down, and protecting one member of the household from violence or exploitation by another. Lord Scarman describes the law of similar orders in England and Wales as[129]

> . . . a hotchpotch of enactments of limited scope passed into the law to meet specific situations or to strengthen the powers of specified courts. The sooner the range, scope and effect of these powers are rationalised into a coherent and comprehensive body of statute law, the better.

This description is equally apt to the situation in Manitoba. The myriad of orders available in Manitoba, the different language used in the various orders to describe terms and conditions, the existence of multiple and sometimes competing orders issued by various levels of court in different jurisdictions, and the variety of means by which one may obtain an order make it difficult

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[127]Schulman Report, *supra* n. 6, at 27.

[128]The Division itself will continue to respond to youth crime, public notification of dangerous sex offenders, applications for dangerous offender designations, and missing persons and runaway youths.

[129]*Richards* v. *Richards*, [1984] A.C. 174 at 206-207 (H.L.(E.)), and cited in The Law Commission (England), *Family Law, Domestic Violence and Occupation of the Family Home* (Report #207, 1992) 1.

for police to determine what outstanding orders exist, to understand what is meant by each particular order, and therefore to enforce such orders.[130]

For an order to be effective, it must be enforceable. This means that police must have ready access to orders issued by different levels of courts in all provinces. Prior to the availability of computer-accessible data to Manitoba police forces, the enforcement of an order depended on the victim having a copy of the order on hand to show to police. The order was literally "just a piece of paper" that the abuser could rip up, burn, or even eat.[131]

The Manitoba Prohibition Information Names Search (PINS) was established as a temporary measure in 1993 as a result of problems with enforcement that became apparent in the aftermath of the stalking deaths of Terry-Lynn Babb and the Paul family.[132] PINS is maintained by the Department of Justice Court Division. All non-communication orders are entered either on PINS by court staff or on CPIC by police. Because of the universality of CPIC, existing records on PINS are being transferred to CPIC. This transition is now taking place. Once completed, all records will be accessible from CPIC and the PINS service will be closed.

These recent reforms have gone a long way in providing easy access to information. There are, however, issues which still require attention. Consideration must be given to reducing or eliminating duplication of services, inconsistency of remedies among statutory regimes, and the need for clear statutory language that is not dependent on case law for accurate interpretation. While the piecemeal nature of legislative reform can make this a difficult task, the enforcement problems caused by the myriad of orders and the serious consequences of non-enforcement make it clear that the task must nonetheless be undertaken. We would therefore recommend:

RECOMMENDATION 16

That legislative reform be undertaken to create uniformity among order provisions in provincial statutes. Specifically, that reform initiatives touching upon family violence, whether focused on existing or new legislation, use similar language, provide similar protections, and authorize similar powers of intervention and remedy.

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[130]We are grateful to Inspector Ken Biener, Winnipeg Police Services, for his helpful comments in this regard.

[131]McGillivray and Comaskey, *supra* n. 7, at 90 and 103.

[132]For a brief descriptions of these two cases, see Manitoba Law Reform Commission, *supra* n. 5, at 1-2.

3. Flagging Potential Danger

In 1997, the Schulman Report recommended "flagging" offences related to domestic violence, connecting PINS to the Canadian Police Information Centre computer system (CPIC) to track offenders and keep victims informed, and recording *ex parte* orders on CPIC to ensure effective prosecution of breaches.[133]

"Flagging" offender records with a code which identifies when an individual's contact with the criminal justice system (including protection orders, arrests, stays of proceedings, discharges, and convictions) involves a vulnerable victim will alert police, prosecutors, and the judiciary to important information. Such knowledge would be very useful in the initial investigation of a domestic abuse incident and when considering the issuance of protection orders. It would also have direct implications for bail hearings, plea negotiations, and sentencing.

For example, in the ordinary course of a criminal prosecution the offender's criminal record is simply "read in" at the sentencing stage without further comment, unless the victim has alerted the Crown prosecutor to the context of previous violations. If the offender's record includes convictions for offences committed against other vulnerable victims, that pattern of offending is not before the court. "Flagging" such convictions will signal to the Crown and the court that there may be a continuing threat to vulnerable victims. Without such coding, a series of convictions for assault, for example, could be passed off by the offender as bar brawls. There is no means of determining the veracity of such an explanation without a concerted search, which is not possible in the exigent circumstances of bail hearings or even guilty pleas, and is rarely undertaken in the ordinary course of prosecution.

A two-letter code appended to the applicable section of the police record of all contacts with a perpetrator would alert police, bail and sentencing courts, and Crown and defence counsel to the nature or pattern of such offences.[134] If accompanied by a Canada-wide database for orders and criminal records (discussed above), this relatively simple change could significantly assist in protecting older adults and other vulnerable victims. While some may argue that such a designation would be prejudicial to an accused, the coding or "flagging" of files is preliminary to the criminal process itself. It would not be evidence against an accused of the likelihood that he or she committed a given offence, but would assist police by identifying particularly high risk offenders, and would assist the court in fashioning an appropriate sentence for an offender once he or she had been convicted.

Flagging these kinds of abusive conduct takes on extra importance with the introduction of the "speedy" protection order regime in Manitoba, under which orders may be issued with little

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[133]Schulman Report, *supra* n. 6, at 89-90.

[134]For example, PA for partner abuse, DA for abuse of a disabled person, EA for elder abuse, and CA for child abuse is a coding series that would be easy to enter.

or no time for investigating a respondent's criminal history. Its significance would be broader in the context of inter-jurisdictional investigations of violence against vulnerable persons. Flagged data accessible on CPIC would help ensure that sentences upon conviction (including rehabilitation conditions) are appropriate to any pattern of offending, and, generally, would ensure greater protection for victims of domestic violence.

RECOMMENDATION 17

That files be "flagged" to designate acts involving victims who are older adults, partners, children, and those living with a disability, and that such designations appear on CPIC data.

RECOMMENDATION 18

That Vulnerable Victims Response Units, modelled on the Winnipeg Police Services initiative, be established in other Manitoba centres.

E. CONCLUSION

The domestic violence Acts of Manitoba, Saskatchewan, Alberta, and Prince Edward Island do not attempt to provide the broad-scale protection of the comprehensive regimes discussed in the previous chapter, regimes dominated by the decision-making of social services personnel. Rather, these Acts focus solely on protection and assistance orders available at the behest of the victim and of various other persons. The Acts offer a swift route to protection orders driven by victim needs and, for the most part, under victim control.

The Commission is persuaded that the Acts reviewed in this Chapter more successfully balance the need to protect victims of abuse with an individual's right to autonomy. Unlike comprehensive adult protection regimes, no agency as such is involved, nor must the adult be identified by anyone other than a justice of the peace or a judge of the Queen's Bench (or Provincial Court in Alberta or Supreme Court in Prince Edward Island) as a person in need of protection. Domestic violence legislation thus avoids stigmatizing designations and preserves the individual's privacy. Moreover, no case planning is thrust upon an uncertain or unwilling victim, and the available remedies are sensitive to the needs and autonomy of victims. It is because of these advantages, then, that the Commission favours domestic violence legislation over the more intrusive comprehensive adult protection regimes.

Manitoba's domestic violence Act reduces the procedural and circumstantial bars to orders presently available under the *Criminal Code* and *The Family Maintenance Act* (discussed in Chapter 3), and, like its counterparts in the other provinces, represents a balanced and laudable legislative approach to the problem of abuse, including elder abuse. Even so, the preceding

examination of the various Acts has convinced the Commission that there is room, and in some cases a need, for improvement in Manitoba's legislation and the enforcement of orders.

In the event that the recommendations contained in this Chapter are implemented, legislators may wish to give serious consideration to renaming the Act to more accurately reflect its scope.

CHAPTER 6

ADDITIONAL REFORM MEASURES

A. VULNERABLE PERSONS LAW CLINIC

Vulnerable persons negotiating the treacherous shoals of legal remedies are disadvantaged by comparison with others. Rights without remedy are bare. Although Manitoba law offers a wide variety of remedies, information may be hard to find and access to some regimes may be difficult and expensive. Affordable advocacy is central to ensuring that the legal rights of vulnerable persons are respected. A Law Clinic dedicated to older adults and other vulnerable victims of abuse, neglect, and exploitation would provide specialized legal information and advice. Such a Clinic could also offer on-site personal counselling and direction toward other services suited to the client's circumstances.

The Clinic might rely for staffing on professional training programs. The University of Manitoba offers courses and internships in law, social work, family studies, psychology, nursing, medicine, and other faculties with an interest in vulnerable victims. Student interns could staff the Clinic for course credit under the guidance of faculty members in their various disciplines. Accredited lawyers, social workers, and other professional personnel would be attached to the Clinic in an advisory capacity and, ideally, staff the Clinic on a part-time basis. Special or designated internships could be created for and by various community and university constituencies. Such a Clinic might be funded as a designated branch of Manitoba Legal Aid Services, Manitoba Justice and Seniors Directorate, and other government sources. All student interns could receive interdisciplinary training in client counselling and ethics before meeting clients.

Research and policy development initiatives could flow through such a Clinic. Institutions dedicated to related research include RESOLVE,[1] located at the University of Manitoba and representing intimate violence research in the prairie provinces and the University of Manitoba Centre on Aging, among others. Strong support was received for the establishment of Law Clinics from the respondents to our Discussion Paper and we concur and recommend that steps should be taken to achieve this goal.

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[1]Formerly The University of Manitoba Centre for Research on Family Violence and Violence Against Women; the Centre mandate includes the investigation of, and development of responses to, age-related domestic violence.

RECOMMENDATION 19

That a Law Clinic be established to provide specialized and informal assistance to vulnerable persons.

B. PUBLIC AWARENESS AND SYSTEM RESPONSE

Other non-legal responses to adult protection and elder abuse include public education to improve knowledge of rights and remedies, professional education, extending the reach of existing programs, developing new services and interagency protocols and, generally, increasing voluntary points of contact with those who can provide services, referral, and advice. These measures are empowering rather than reactive and enhance rather than limit the options available to older persons and other vulnerable persons. A high level of public and professional awareness has been shown to be the single most important factor in identifying abuse and neglect.[2] Knowledge of rights and options is a key factor in decreasing tacit support of abuse and encouraging reporting by the victim and by those cognizant of the situation but uncertain how to evaluate it. Education reinforces perceptions that abuse and exploitation are wrong and deflects blame from the victim to the offender. Such campaigns should be targeted at the general public, the vulnerable group concerned, ethnic groups, and professionals who may have contact with vulnerable populations. High school health and social studies classes are useful forums for discussing intimate violence.

Manitoba offers a number of services and agencies dedicated or relevant to elder abuse. An elder abuse toll-free crisis telephone line, guaranteeing confidentiality and offering services in French and English, was announced on March 24, 1999.[3] The line is managed by the Manitoba Seniors Directorate, which provides assistance to communities throughout the province to develop local responses to the needs of older people. It is to be supported by a public awareness campaign and a consultant who will work with Manitoba communities to find effective ways of addressing elder abuse.

Manitoba resources for older adults provide a range of services, varying from place to place. Winnipeg's Age and Opportunity operates six seniors centres offering educational and recreational programs, counselling, caregiver resources, retirement planning, legal assistance, visiting services; and the Elder Abuse Resource Centre, founded in 1990. That Centre campaigns for public awareness, trains professionals and post-secondary students, offers counselling services

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[2]See G.J. McDonald, Associate Director, Income Security Issues, *Report to the Select Committee on Aging, House of Representatives* (April 24, 1991).

[3]Manitoba Government News Release, "Province establishes elder abuse line" (March 24, 1999).

and collects data on elder abuse.[4] Selkirk's Nova House, serving the Interlake area, provides shelter, counselling, a peer support program and training. The Manitoba Interdepartmental Working Group on Elder Abuse and the Manitoba Seniors Directorate developed a protocol manual on elder abuse in 1993 and a guide for developing multidisciplinary teams in 1994.[5] Three Winnipeg information centres, the Manitoba Seniors Directorate, the Contact Community Information Centre, and Le centre de ressources communautaire, coordinate services. A multi-purpose organization, the Manitoba Society of Seniors, offers referrals to legal services. Ten multi-purpose senior centres are located throughout Winnipeg, six of which are operated by Age and Opportunity. Rural Manitoba is served by nine community centres for seniors and by 77 community resource councils offering support programs that enable older people to remain in their homes and communities. Support services may include community meals, visitors, housekeeping, transportation, telephone safety checks, and emergency response programs. Winnipeg is served by 10 such councils. The Province is served by 13 Regional Health Authorities, two of which are located in Winnipeg, offering home care programs that variously provide help with personal care, health care, housekeeping and home services, family relief, and caregiver respite.

A range of social support systems accessible by choice and designed for the population group in question is of central importance in enhancing victim choice and combatting abuse. The most effective remedy for neglect and self-neglect of older adults is the provision of in-home services on a voluntary basis, including such services as meals, nursing care, medical treatments and housekeeping services. A trained service provider invited into the home can identify danger signs and assist in providing other services with the cooperation of the adult. In addition to highlighting the importance of volunteer training and enhanced training for professional service providers, the provision of alternate sources of care and of caregiver respite reduces caregiver stress, a major contributing factor in the abuse, neglect and exploitation of vulnerable adults and older people. The rise of community centres for older people, young mothers, Aboriginal people, and children and youth is a promising development. Centres for older people have taken various forms including drop-in centres with a range of social activities from card games to hot lunches to crafts and dance, blood pressure clinics held bi-weekly which serve coffee and cookies, and information centres. Local coffee-shops and social clubs perform important services. These lack the "social services" component of centres for older people but are appropriate places to target abuse awareness campaigns.

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[4]The Centre also offers group therapy for women over 60 years of age who are abused by partners, and for men and women over 60 who are abused by their adult children. See also P. McKenzie, L. Tod and P. Yellen, "Community-Based Intervention Strategies for Cases of Abuse and Neglect of Seniors: A Comparison of Models, Philosophies and Practice Issues" in M.J. MacLean, ed., *Abuse and Neglect of Older Canadians: Strategies for Change* (1995) 17.

[5]Manitoba, Interdepartmental Working Group on Elder Abuse and Manitoba Seniors Directorate, *Abuse of The Elderly: A Guide for The Development of Protocols* (February 1993); Manitoba, Multidisciplinary Team Working Group on Elder Abuse and Manitoba Seniors Directorate, *Abuse of The Elderly: A Manual for The Development of Multidisciplinary Teams* (February 1994). The "generic protocol" covers intake and documentation, assessment and investigation, intervention and action, and follow-up. On elder abuse variables and recommendations for policy, practice, and research, see British Columbia, Interministry Committee on Elder Abuse, *Services for Abused Older Canadians* and *A Guide to Enhancing Services for Abused Older Canadians* (1995).

On the other end of the response scale are shelter services which provide temporary places of safety, counselling and assistance, and longer-term transitional housing. Shelters for women and their young children, although still inadequate in terms of geographical dispersement, have been available for several decades. In some locations, hostels are available for men and, in larger centres, for youth. The first shelter for older adults in Canada, also a "first" in North America, has been established in Calgary, close to the city's seniors resource centre.[6] Staffed by social workers, it will accommodate 25 people over the age of 60 for up to three months. Physical, emotional, and short-term financial support are available. Referrals can come from social and medical service providers, neighbours, and friends but entry is voluntary. Fees are based on ability to pay and residents can leave as soon as they find a safe environment. The concept was born from two seniors' workshops on elder abuse. Funding came from an anonymous donor, private corporations, government sources, and public fund-raising. The project includes a research component and is being monitored in Canada and the United States.

Finland pioneered a concept of elder shelters in 1992 with a shelter and outreach program using spaces and resources of nursing and residential care homes.[7] The home provided a shelter setting in its short-term care ward and assigning a nurse to each resident. A crisis telephone line was made available to non-residents who need information, support, advice, and the opportunity to discuss emotions. Group meetings with a nurse and a social worker were held every two weeks for residents and non-residents. In addition to providing profiles of coping strategies (mostly passive) and abusers (primarily husbands and sons), the home fulfilled the need for crisis services, rest and security, and a time to reconsider needs. Most residents studied left in 10 days, the majority returning home. The study concluded that victims need support in regaining self-esteem and independence, assigning responsibility for the abuse, acquiring knowledge of available resources, and generally breaking the cycle of violence. The use of existing facilities to provide emergency shelter services may be a lower-cost but effective alternative to the building of self-contained shelters.

Researchers analysing The National Elder Abuse Incidence Study data, discussed above and in Chapter 2, identified the parameters of policy design and practice as "programmatically responsible, fiscally sound, and compassionate". Practitioners, caregivers, researchers and others are invited by the researchers to design and strengthen approaches to prevention and reduction of abuse, neglect, and exploitation, based on the data collected. The data suggests several issues to be considered in designing new approaches and strengthening existing ones. These, as summarized above, point in particular to the vulnerability of older members of the "over-60" category, to the impact of ethnicity on self-reporting, and to the impact of familial connections

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[6] J. Creighton, "Calgary seniors to get sanctuary from abuse," *Winnipeg Free Press*, January 22, 1998, C13.

[7] S. Perttu, "Abuse of the Elderly: Services Provided for Victims in a Finnish Nursing Home - 1992-1993" (1996), 8 J. of Elder Abuse and Neglect 23.

on relationships between caregiving and abuse, neglect and exploitation, and on the identification and reporting of abuse.

Coordinating agency response may be aimed at a specific social problem such as domestic violence or to a population group such as older people. More difficult is the coordination of agency response in the individual case,[8] preventing victims from "falling through the cracks" in system response, and maintaining victim confidentiality and safety.[9] A four-tier system of service delivery to diversify response and respect choice has been proposed in Nova Scotia, consisting of

- informal peer counselling within existing seniors' groups;
- help and advice from front-line workers in the legal system, community and health delivery systems and seniors' organizations;
- consultation with adult protection workers for problems not resolvable by front-line workers; and
- Elder Abuse Consultation Committees, to include gerontologists, social workers, health professionals, representatives of human rights groups, police, lawyers, and seniors, for general and specific programs and the collection and dissemination of information.[10]

Generally, intervention on a community and agency level is more closely driven by victim needs and responses than legislation granting larger powers of intervention to such agencies. We noted from the responses received that services for older adults in smaller Manitoba centres and rural areas are comparatively limited. One option is to establish satellite branches of the Winnipeg Elder Abuse Resource Centre. Enhancement of the Centre's staff, resources, and program delivery area would permit a greater number of clients to be served by an agency with a proven track record of counselling and public advocacy. This would require greater appropriation of funds, which would be offset by savings in other systems, including the justice system, medicare, and residential and nursing care. Consideration should also be given to providing comfortable spaces for elders by using existing shelters and senior and care home spaces as service centres for elders.

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[8]The Family Violence Court, established in Winnipeg in 1990, is one such initiative. Elder abuse cases are virtually never heard, in this or any other Manitoba court; see Chapter 3. On gaps in domestic violence response generally, see Manitoba, Commission of Inquiry into the deaths of Rhonda Lavoie and Roy Lavoie, *A Study of Domestic Violence and the Justice System in Manitoba* (1997) (Hon. Mr. Justice P.W. Schulman, Commissioner). Also see E.J. Ursel, M. Bertrand and R. Perozzo, *Lavoie Inquiry Implementation Committee, Final Report* (1998), reporting on the successful implementation of the majority of recommendations.

[9]Protecting the confidentiality of documents produced by various agencies, police and health care professionals. A young offenders initiative developed in Brandon, Manitoba involves interagency coordination and information-sharing, while protecting confidentiality. The Brandon model may be useful in developing inter-agency response protocols for elder abuse and adult protection.

[10]J. Harbison *et al.*, *Mistreating Elderly People: Questioning the Legal Response to Elder Abuse and Neglect*, vol. 1 (Nova Scotia, The Elder Abuse Legislation Research Team, 1995) 93-95.

RECOMMENDATION 20

That the current programs, including police and agency response, be enhanced in a manner that maximizes choice and autonomy and that a coordinating agency, such as the Elder Abuse Resource Centre in consort with the Seniors Directorate, be vested with such a responsibility.

RECOMMENDATION 21

That in-home services for older people and the provision of caregiver respite be enhanced in rural areas.

RECOMMENDATION 22

That the Minister responsible for older persons together with the Elder Abuse Resource Centre, among others, design rights-based public education programs and that seminars be provided on a regular basis to the general public and, in particular, to older persons, health care providers, social workers, police, lawyers and judges.

C. FINANCIAL EXPLOITATION

Another issue which we believe requires attention is the financial exploitation of vulnerable adults. In some instances, financial institutions have taken a lead in the education and prevention of financial abuse and exploitation. "If you're old, be prepared to be a target. Charlatans bearing stories too good to be true are on the lookout for you,"[11] one newspaper article on the subject begins. Scotiabank and the Metro Toronto Volunteer Centre have established a program in which older persons make presentations to this age group on "con" tactics and their avoidance. The program is being expanded to other Canadian centres. Fraud prevention pamphlets are distributed by the bank. Canadians over 60 constitute 56% of victims of telemarketing fraud and 85% of those who lost over $5000 to such fraud. Other initiatives include "PhoneBusters," the major source of Canadian information on this kind of fraud, devised by the RCMP, Ontario Provincial Police, Industry Canada, the Ontario Ministry of Consumer and Corporate Affairs, and the Canadian Bankers Association.

Although these initiatives do not address financial abuse by family members, especially where money and goods are gradually pilfered, or where the adult is manipulated into giving away money or goods that the adult cannot afford to lose, the "just say no" message given at such sessions may help to some extent. Some financial institutions take extra care with elderly clients,

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[11] S. Lambert, "Beat the con men; program helps elderly close door on scams" *Winnipeg Free Press*, February 12, 1998, B5.

especially where unusual withdrawals are requested. Training sessions for bank employees and seminars for older persons and others vulnerable to financial exploitation by intimates or stranger "con artists" would enhance resistance to financial exploitation.

RECOMMENDATION 23

That formal training sessions for bank employees and seminars for vulnerable persons be undertaken, in consort with the Winnipeg Elder Abuse Resource Centre, among others, and that regional and local needs and knowledge be built into such sessions.

D. REPORTING

Should there be a legal requirement on all citizens to report an adult in need of protection? Should there be a legal burden on professions to report? Reporting laws are found in most adult protection legislation regimes. Good-faith reporting does not require legislative protection to shield the reporter from civil liability, while mandatory reporting has been subject to criticism based on problems of over-reporting. The only mandatory reporting legislation in Manitoba at the present time falls under *The Child and Family Services Act*. As part of the goal of that legislation is family health, and as violence between adults has been conclusively shown to have negative consequences for children, it is conceivable that the duty to report could be extended under the Act to vulnerable adults.

The optimum solution is to encourage professional associations to develop reporting standards for members. The Manitoba Law Society *Code of Professional Conduct*, for example, protects lawyer-client communications as deeply privileged. Even so, the Code permits the lawyer to disclose a future crime and mandates disclosure where a future crime is one of violence. Chronic domestic violence and violation of intimates falls into the second category. Other professional organizations might develop reporting standards requiring a member as a matter of professional obligation to report an adult in need of protection, even where the risk faced by the adult may not amount to a criminal offence. Indeed, for professions directly concerned with adult health and well-being, a broader standard is supportable.

RECOMMENDATION 24

That professional and care-providing organizations develop mandatory reporting standards for members as a matter of professional obligation.

CHAPTER 7

LIST OF RECOMMENDATIONS

The following are the recommendations contained in this Report.

1. That *The Domestic Violence and Stalking Prevention, Protection and Compensation Act* be amended to provide greater protection to victims of abuse by:
   (a) widening the definition of "domestic violence" to *include* certain conduct. Such an expansion would give designated justices of the peace and the court some leeway in determining whether conduct that does not fall squarely within the list of specified conduct should be characterized as violence in particular circumstances; and
   (b) including a vicarious responsibility provision stating that a respondent who encourages or solicits another person to commit an act that, if done by the respondent, would constitute family violence, is deemed to have committed that act personally. (pp. 44-45)

2. That the Act be amended by extending protection in respect of persons who have easy and frequent access to another person's household, regardless of whether the persons are related to one another by blood, marriage, or shared responsibility for the care of children, or whether they reside or have resided together. (p. 47)

3. That the Act be amended by permitting a broader range of persons, including certain designated persons (such as social workers) and friends or relatives (with the permission of the designated justice of the peace or the court) to apply for orders on behalf of victims. (p. 49)

4. That the Act be amended to allow the same persons to apply for either a protection or a prevention order under the Act. (p. 49)

5. That the Act be amended to include a list of factors to assist justices of the peace in determining emergency protection orders (which list ought to include consideration of the best interests of any child of the victim). (p. 53)

6. That the Act be amended to provide designated justices of the peace and the Court of Queen's Bench with the means to respond appropriately to particular circumstances of domestic abuse by allowing for the inclusion in an order of any

provision considered necessary. Minimally, the Act should enable justices of the peace to:

(a) grant sole occupancy of a residence;
(b) award temporary care and custody of a child;
(c) award temporary possession of a vehicle; and
(d) prohibit the respondent from dealing with specified property. (p. 53)

7. That the Act to be amended to provide that justice of the peace be required to specify a date on which the emergency protection order will terminate, which date shall not exceed 90 days from the date of issue. (p. 53)

8. That the Act be amended to provide that justices of the peace may include provisions in an emergency protection order necessary or advisable for the immediate protection of the subject or the subject's children. (p. 54)

9. That the Act be amended so as to better meet the needs of, and provide greater protection for, children by providing for direct compensation payable to any child of the subject (or in the care and custody of the subject) for any monetary loss suffered by the child as a result of the domestic violence or stalking, and that the protection afforded by publication bans ought to be available if publication would not be in the best interests of any child of the subject. (p. 56)

10. That the Act be amended to permit the granting of a protection order or a prevention order to an applicant who fears for the safety of someone known to him or her, rather than for his or her own safety. (p. 57)

11. That the Act be amended to allow the Court to require that the respondent receive counselling, as opposed to recommending that he or she do so. (p. 58)

12. That the Act be amended to permit a peace officer to enter premises, with a warrant, in circumstances where information on oath has established that there is reason to believe that someone is being abused and access to that person has been denied. (p. 59)

13. That the Act be amended to require that protection orders be reviewed and confirmed, varied or revoked by a judge of the Court of Queen's Bench within 7 days of receipt of the order and all supporting documentation by the court. (p. 67)

14. That the Act be amended to permit a respondent, on a rehearing or application to set aside a protection order, to call additional evidence, to cross-examine the applicant or other witnesses, and otherwise to test the evidence that was before the issuing justice. (p. 67)

15. That the Act be amended to provide that on reviewing an emergency protection order, or on an application to set aside such an order, the Court of Queen's Bench be required to determine whether the seriousness or urgency of the situation justifies the confirmation or continuation of the order. (p. 67)

16. That legislative reform be undertaken to create uniformity among order provisions in provincial statutes. Specifically, that reform initiatives touching upon family violence, whether focused on existing or new legislation, use similar language, provide similar protections, and authorize similar powers of intervention and remedy. (p. 71)

17. That files be "flagged" to designate acts involving victims who are older adults, partners, children, and those living with a disability, and that such designations appear on CPIC data. (p. 73)

18. That Vulnerable Victims Response Units, modelled on the Winnipeg Police Services initiative, be established in other Manitoba centres. (p. 74)

19. That a Law Clinic be established to provide specialized and informal assistance to vulnerable persons. (p. 76)

20. That the current programs, including police and agency response, be enhanced in a manner that maximizes choice and autonomy and that a coordinating agency, such as the Elder Abuse Resource Centre in consort with the Seniors Directorate, be vested with such a responsibility. (p. 80)

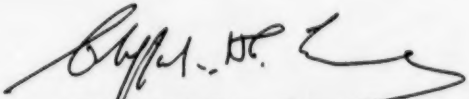
21. That in-home services for older people and the provision of caregiver respite be enhanced in rural areas. (p. 80)

22. That the Minister responsible for older persons together with the Elder Abuse Resource Centre, among others, design rights-based public education programs and that seminars be provided on a regular basis to the general public and, in particular, to older persons, health care providers, social workers, police, lawyers and judges. (p. 80)

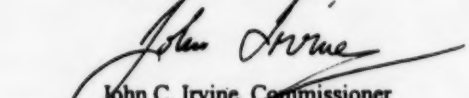
23. That formal training sessions for bank employees and seminars for vulnerable persons be undertaken, in consort with the Winnipeg Elder Abuse Resource Centre, among others, and that regional and local needs and knowledge be built into such sessions. (p. 81)

24. That professional and care-providing organizations develop mandatory reporting standards for members as a matter of professional obligation. (p. 81)

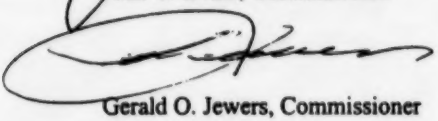
This is a Report pursuant to section 15 of *The Law Reform Commission Act*, C.C.S.M. c. L95, signed this 15th day of December 1999.



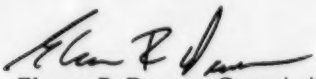
Clifford H.C. Edwards, President



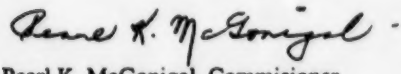
John C. Irvine, Commissioner



Gerald O. Jewers, Commissioner



Eleanor R. Dawson, Commissioner



Pearl K. McGonigal, Commisioner

APPENDIX A

LIST OF PERSONS AND ORGANIZATIONS WHO RESPONDED TO THE DISCUSSION PAPER

Age & Opportunity
Winnipeg Hospital Authority
Canadian Centre on Disability Studies
Dianne Mowdy, B.A., C.Ed., M.S.W.
Brandon Seniors for Seniors Co-op Inc.
Deer Lodge Centre
Daniel Heinrichs
Seniors Directorate, Province of Manitoba
Community Forum on Elders in Abusive Relationships
Health Programs, Manitoba Health, Mental Health Branch, Province of Manitoba
Joan Kupchak
Hon. David G. Newman, Minister of Mines and Energy and Minister of Northern Affairs, Province of Manitoba

LIST OF PERSONS AND ORGANIZATIONS TO WHOM COPIES OF THE DISCUSSION PAPER WERE SENT[1]

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Hon. Harry Enns - Minister of Agriculture
Hon. James Downey - Deputy Premier
Hon. James Cummings - Minister of Natural Resources
Hon. James McCrae - Minister of Environment
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Hon. Jack Reimer - Minister of Urban Affairs
Hon. David Newman - Minister of Energy and Mines

[1]We apologize for any spelling errors in the names of persons and organizations to whom copies of the Discussion Paper were sent. Many names were received by staff on the telephone and may have been inadvertently misspelt.

Hon. Franklin Pitura - Minister of Government Services
Hon. Michael Radcliffe, Q.C. - Minister of Consumer and Corporate Affairs
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D. Harvey - Senior Crown Attorney, Family Violence Unit, Criminal Justice Division
J. MacPhail, Director - Family Law, Civil Justice Division
Tom Hague - Director, Civil Legal Services, Civil Justice Division
Rosemarie Cuddy - Public Trustee's Office
J. Dupont - Supervisor, Women's Advocacy Program
Colette Chelack - Family Law Division
Jeff Schnoor - Director, Criminal Justice Policy Branch
Margaret Bilash - Coordinator, Victim/Witness Assistance Program
Rob Finlayson - Director, Prosecutions
Court of Queen's Bench, Family Division
    Hon. G. Mercier - Associate Chief Justice
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Winnipeg Police Services
    Chief David Cassels
    Insp. Ken Biener - Vulnerable Persons Unit, Division 21
    Sgt. Bob Irwin - Victim Services
    Sgt. Steve Pilote - Youth Division
Melanie Lautt - Chair, Family Law Section, Manitoba Bar Association
Norm Cuddy - Wolch, Pinx, Tapper, Scurfield
Prof. Robert Gordon - Department of Criminology, Simon Fraser University
Prof. John Bond - Human Ecology Building, University of Manitoba
Dr. Jane Ursel - Manitoba Research Centre on Family Violence, University of Manitoba
Dr. Laurel Strain - Director, Centre on Aging, University of Manitoba
Concordia Hospital - Arle Janes, Department of Social Work
Misericordia Hospital - Carol Babiak, Educational Services
Riverview Health Centre - Elizabeth McKean
St. Boniface General Hospital - Harvey Secter, Chair, Committee on Aging
St. Boniface General Hospital - Cheryl Bokhaut, Geriatric Day Hospital
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    Gail Smidt - President
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Cynthia Cameron
Heather Chernoff
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Eleanor Chuckry
Margaret Clarke
Vanessa Coniglio
Diane DeGraves
Barbara Evans, Headingly MB
Lynne Fineman
Pat Gray
Dr. Stuart Hampton, Brandon MB
Dorothy Hardy
Kimberly Hogg
Louise Horst
Catherine Jacob
June Kaan
Leona Kaban
Louise Kennedy
Esther Korchynski
Denise Koss
Debrah Kostyk
Dawn Lazar
Geri Lowe
Sonja Lundstrom
Geri McGrath
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Irene Muzyka
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Maria Rogers
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Jay Spicer
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Jacqueline Theroux, Notre Dame de Lourdes MB
Sally Thomas
Dianne Urquhart

Susan Vovchuk, Starbuck MB
Tiffany Westdal
Bev Worbels
Jeanette Block
Daniel Heinrichs
J.E. Hudson, Hamiota MB
Rose Parker
Anne Skuba
Barb Sparling
Johanna Berten
Cheryl Christian
Aviva Cohen
Dan Lapuk

Support Services to Seniors

Brandon

Margaret Gibb - Seniors for Seniors Co-op
Wendy Pederson - Seniors for Seniors Co-op
Donna Thompson - Tenant Support Service Committee (Manitoba Housing Authority)

Central Region

Odette Beaudin, Elie - Cartier Senior Citizens Support Committee
Debbie Drummond, Holland - Maintaining Independent Living with Extended Services to Seniors
Karen Dyck, Morden - Morden Services for Seniors
Marion Harder, Winkler - Winkler Multi-Purpose Senior Centre
Darlene Henderson, Manitou - Pembina Manitou Health Centre
Ann Kroeker, Altona - Community Assistance for the Elderly
Betty Lou Lewis, Portage La Prairie - Portage Services for Seniors
Josie Robinson, Holland - Maintaining Independent Living with Extended Services to Seniors
Nola Sylvester, Carman - Carman Community Senior Resource Council
Carl Teichrib, Gladstone - Gladstone Area Seniors Support Programming
Lillian Unrau, MacGregor - MacGregor-Austin Seniors Support Program
Bev Walters, Morris - Morris Area Senior Services Inc.

Eastman Region

Gaby Catellier, St. Malo - Chalet Malouin
Nancy Constantine, Oakbank - Oakbank-Springfield Seniors Complex Inc.
Valerie Feilberg, Prawda - Elma-Reynolds Community Support Services for Seniors
Abe Goertzen, Niverville - Niverville Seniors Services
Lynda Rozsa, South Junction - Lodge of Piney Community Resource Council

Interlake Region

Sheryl Clyde, Stonewall - South Interlake Seniors
Shelley Krause, Stonewall - South Interlake Seniors
Nicole Dreger, Eriksdale - Eriksdale Community Resource Council

Margaret Gutknecht, Ashern - Living Independence for Elders Inc.
Doreen Johnson, Riverton - Riverton and District Friendship Centre Inc.
Shelly Karpa, Selkirk - Gordon Howard Senior Centre
Beth King, Teulon - Teulon and District Seniors Resource Council
Heather McBey, Arborg - Arborg and District Resource Council
Valerie Swanson, Gimli - Gimli Seniors Resource Council Inc.
Nancy Thom, Gimli - Gimli Seniors Resource Council Inc.
Cindy Thorkelson, Lundar - Lundar Community Resource Council

Parkland Region

Ann Alt, Swan River - Swan River and District Community Resource Council
Susan Bauer, Dauphin - Dauphin and District Community Resource Council
Margaret Froese, McCreary - McCreary Support Services to Seniors
Sharon Ives, Ste. Rose - Ste. Rose and District Resource Council
Anna Stewart, Roblin - Roblin and District Community Help Centre Inc.

Steinbach

Tina Barkman - Parkview Apartments
Dianna Schellenberg - Parkview Apartments
Lyona Costinak - Steinbach Housing Inc., Fernwood Place
Marilyn Wieler - Serving Seniors Inc.

Thomspon

Margaret Huculak - Thompson Seniors Resource Council

Westman Region

Lynn Asham, Glenboro - Seniors Independent Services Glenboro
Michael Berry, Reston - Seniors Helping Hand of Alstone Inc.
Jill Canart, Elkhorn - Seniors - Access to Independent Living
Mary-Ann Carlisle, Souris -Seniors Organized Services of Souris Valley Inc.
Frances Cavers, Pilot Mound - Louise Community Services for Seniors
Lynne Cornish, Miniota Miniota Municipal Services to Seniors
Louise Dekeyser, Waskada - Seniors Outreach Services of Bren-Win Inc.
Lydianne Deschambault, St. Lazare Valley Services to Seniors
Joan Eliasson, Russell - Senior Services of Banner County
Val Ferguson, Bincarth - Senior Services of Banner County
Thelma Forbes, Virden - Seniors Access to Independent Living
Lillian Gandza, Shoal Lake - Seniors Services of Prairie Parklands Inc.
Jean Gompf, Kenton - Woodworth Seniors Service
Lois Grieve - Boissevain - Senior Services of Turtle Mountain Area
Myrna Halstead, Killarney - Share Our Serices Tri Lake Health Centre
Darcie Herbert, Melita - Senior Services of Antler River Inc.
Betty Hicks, Hartney - Seniors Organized Services of Souris Valley Inc.
Genie Kennedy, Neepawa - Home Assistance in Neepawa and District Inc.
Cheryl Kustra, Minnedosa - Minnedosa and District Services to Seniors
Verna Martin, Strathclair - Senior Services of Prairie Parkland Inc.
Barb McCrindle, Foxwarren - Foxwarren Leisure Centre

Betty Minshull, Pierson - Seniors Services of Antler River Inc.
Lorna Minty, Erickson - Erickson Onanole Service to Seniors
Penny Mychasiw, Rossburn - Rossburn and District Seniors Helpers
Ainsley Nettle, Birtle - Valley Services to Seniors
Racille North, Wawanesa - Seniors Independent Services Wawanesa
Glenda Reynolds, Carberry - Carberry Plains Services to Seniors
Dana Routledge, Hamiota - Hamiota Seniors Council Inc.
Kathy Seyferth, Rivers - Seniors Services of Rivers-Rapid City and District
Margaret Sigvaldason, Baldur - Seniors Independent Services Baldur/Belmont
Bernie Szoradi, Deloraine - Seniors Outreach Services of Bren-Win Inc.
Ruby Thibeault, Rapid City - Seniors Services of Rivers-Rapid City and District
Sandy Yake, Cartwright - Seniors Services of Roblin-Cartwright

Winnipeg

Pat Hope - Manitoba Housing Authority
Lori Hudson - Manitoba Housing Authority
Rajdeep Rattan - Manitoba Housing Authority
Marlene Shuster - Manitoba Housing Authority
Evelyn Bova - Villa Cabrini Inc.
Bobbi Bresky - North Winnipeg Cooperative Council
Joyce Connolly - Deaf Centre of Manitoba
Lynn Crawford - Lions Place
Ruth Friesen - Bethel Place
Rene Gaudry - Accuiel Colombien Inc.
L. Johnson - Boni Vital Council for Seniors
Connie Magnusson-Schimnowski - Middlechurch Home of Winnipeg
Maureen McCatty - North Winnipeg Cooperative Community Council
Donna Pelltier - St. James/Assiniboine Seniors Centre
Crys Porter - Weston-Brooklands Community Resource Council
Dorthee Reimer - Seniors Home Help
Linda Rigaux - The Friendly Neighbor Council
Mary Anne Roberts - Rupertsland Respite Care Program
Dianne Silverthorne - Lions Manor
Doug Wasyliw - Creative Retirement Manitoba

Personal Care and Nursing Homes

Beacon Hill Lodge - Phyllis Boryskiewich, Administrator
Bethania Mennonite Personal Care Home - Helmut Epp, Administrator
Central Park Lodges - Don Solar, Administrator
Deer Lodge Centre - Tim Duprey, Administrator
Donwood Manor Personal Care Home - Herta Janzen, Administrator
Extendicare/Oakview Place - Debbie Senychych, Administrator
Extendicare/Tuxedo Villa - Mrs. King, Administrator
Fort Garry Care Centre - Gerald Kalef, Executive Director
Fred Douglas Lodge - Marilyn Robinson, Executive Director

Golden Door Geriatric Centre - L. LeBlanc, Administrator
The Golden Links Lodge - Doreen Rosmus, Administrator
Heritage Lodge Personal Care Home - Linda Norton, Administrator
Holiday Haven Nursing Home - Joanne Sarraino, Administrator
Holy Family Home - Jack Kifil, Administrator
Life Care Centre - W. Ouellet, Owner
Luther Home - James Gessner, Administrator
M.B. Lodge - Mrs. Garcia, Administrator
Maples Personal Care Home - Robert Beaudin, Administrator
Meadowood Manor Personal Care Home - Charles Kunze, Administrator
Middlechurch Home of Winnipeg - L. Holgate, Executive Director
Park Manor Personal Care Home - Charles Toop, Executive Director
River East Personal Care Home - Ron Baron, Administrator
St. Adolphe Nursing Home - Mrs. Cramp, Director of Nursing
St. Joseph's Residence - Marianna Muzyka
St. Norbert Nursing Home - Robert Brousseau, Administrator
Sharon Home - Audrey Arlinsky, Chief Executive Officer
Tache Nursing Centre - Tache Nursing Centre
Vista Park Lodge - Joe McKee, Administrator
West Park Manor Personal Care Home - Ken Reimche
Windell Retirement Home - Peter Blummenchein

Seniors' Resources and Centres

Manitoba Society of Seniors - Ramon Kopas, Director of Planning and Development
Broadway Seniors Resource Council - Brenda Friesen, Administrator
Catherine Place
Main Street Senior Centre - John Zacharuk, Centre Facilitator
The Prendergast Seniors - Ernie Harris, President
Selkirk Avenue Senior Centre - Barbara Russell, Administrator
Stradbrook Senior Centre - Susan Sader, Centre Facilitator
Pluri-Elles - Murielle Gagner-Ouellette, Executive Director
Manitoba League of Persons with Disabilities Inc. - David Martin, Provincial Coordinator
Manitoba Gerontological Social Workers Interest Group - Suzanne Rutledge, Secretary
Manitoba Women's Directorate - Executive Director
St. James-Assiniboia Senior Centre Inc. - Arlene Jones, Seniors Wellness Centre

Winnipeg Community and Long Term Care - Ms. J. Edwards
Immigrant Women's Association of Manitoba - Martha Aviles, Executive Director
Age & Opportunity - David Burnside, Incoming President
Age & Opportunity - Gloria Dixon, Manager, Specialized Services/Elder Abuse Resource Centre
Age and Opportunity - Maria Wasylkewycz, Elder Abuse Coordinator
Cree Nation Child & Family Caring Agency - Maria Wasylkewycz, Elder Abuse Coordinator
Manitoba Women's Advisory Council - Lynda Saelens (20 Copies)

C.N.I.B. - Donna Hicks, Executive Director
Manitoba Association of Health Care Professionals - Ron Wally, Executive Director
Manitoba Association of Registered Nurses - Irene Crowe, Health Policy Consultant
Manitoba Association of Social Workers - Ron Sharegan, President
Ma Mawi-Wi-Chi Itata Centre - Josie Hill, Executive Director, Family Violence Program
College of Physicians and Surgeons - Dr. Kenneth Brown, Registrar
Manitoba Gerontological Nursing Association - Ann Lemieux, President
Salvation Army Ethics Centre - James E. Read, Executive Director
Canadian Centre on Disabilities Studies - Dr. Henry Enns, Executive Director
Pearl Soltys - Program Specialist, Manitoba Health, Health Programs
Kathy Yurkowski - Executive Director, Manitoba Seniors Directorate
Susan Barnsley - Executive Director, Manitoba Women's Advisory Council
Cathy Gfellner-Donald - Regional Coordinator, Home Care, Brandon RHA
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Diane Mowdy - Winnipeg MB
Jean Kupshak - Winnipeg MB
Janis Bermel - Winnipeg MB
Murray Smith - Winnipeg MB
Chris Gomez - Winnipeg MB
Rica Thorne - Winnipeg MB
Carole McCausland - Boissevain MB
Sterling Walkes - Retired Social Worker, Rupert's Land Caregivers Association
Ms S. Hansen - Consultant, Winnipeg MB
Clark Dalton, Director, Legal Research and Analysis, Alberta Justice, Edmonton, AB
Marlene Bertrand, Director, Family Dispute Services, Department of Family Services
Laura Devlin, Alzheimer's Society, Winnipeg, MB
Louise Gillman, Winnipeg, MB
Joan Saxton, RN, Klinic, Winnipeg, MB
Anne Cathcart, Social Work Department, Riverview Health Centre, Winnipeg, MB
Ron Habing, Habing & Associates, Barristers & Solicitors, Winnipeg, MB
Jacqueline Chartrand, Regional Coordinator, Canada Technology Network, Winnipeg, MB
Heather McLaren, Legislative Unit, Manitoba Health, Winnipeg, MB

APPENDIX B

UNITED NATIONS PRINCIPLES FOR OLDER PERSONS

To add life to the years that have been added to life

The General Assembly,

Appreciating the contribution that older persons make to their societies,

Recognizing that, in the Charter of the United Nations, the peoples of the United Nations declare, inter alia, their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to
promote social progress and better standards of life in larger freedom,

Noting the elaboration of those rights in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and other declarations to ensure the application of universal standards to
particular groups,

In pursuance of the International Plan of Action on Ageing, adopted by the World Assembly on Ageing and endorsed by the General Assembly in its resolution 37/51 of 3 December 1982,

Appreciating the tremendous diversity in the situation of older persons, not only between countries but within countries and between individuals, which requires a variety of policy responses,

Aware that in all countries, individuals are reaching an advanced age in greater numbers and in better health than ever before,

Aware of the scientific research disproving many stereotypes about inevitable and irreversible declines with age,

Convinced that in a world characterized by an increasing number and proportion of older persons, opportunities must be provided for willing and capable older persons to participate in and contribute to the ongoing activities of society,

Mindful that the strains on family life in both developed and developing countries require support for those providing care to frail older persons,

Bearing in mind the standards already set by the International Plan of Action on Ageing and the conventions, recommendations and resolutions of the International Labour Organisation, the World Health Organization and other United Nations entities,

Encourages Governments to incorporate the following principles into their national programmes whenever possible:

Independence

1. Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.

2. Older persons should have the opportunity to work or to have access to other income-generating opportunities.

3. Older persons should be able to participate in determining when and at what pace withdrawal from the labour force takes place.

4. Older persons should have access to appropriate educational and training programmes.

5. Older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities.

Participation

7. Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.

8. Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities.

9. Older persons should be able to form movements or associations of older persons.

Care

10. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.

11. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.

12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.

13. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.

14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

Self-fulfilment

15. Older persons should be able to pursue opportunities for the full development of their potential.

16. Older persons should have access to the educational, cultural, spiritual and recreational resources of society.

Dignity

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.

18. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.

REPORT ON ADULT PROTECTION AND ELDER ABUSE

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

A. INTRODUCTION

This project originated from a request by the Age and Opportunity Elder Abuse Resource Centre of Manitoba that the Commission investigate the present state of the law relating to the abuse of elderly persons in Manitoba. In the early stages of its research, it became clear to the Commission that the issues in need of consideration were not limited to the area of elder abuse but rather to the more general provision of legal recourse to all victims of domestic violence.

At the outset, the Commission prepared a Discussion Paper on the issue of elder abuse and adult protection, and circulated it to interested parties for comment. This Report reflects the Commission's consideration of the responses to that Discussion Paper.

B. THE SCOPE OF THE PROBLEM

Elder abuse is merely one dimension of domestic violence, which includes the physical and psychological abuse of children and partners as well as the sexual abuse of children. Like other forms of family-related violence, elder abuse may take the form of physical, emotional, and financial abuse, the restriction or denial of rights and freedoms, and active and passive neglect. One portrait of a perpetrator is the pathological caregiver, who may be a substance abuser or suffer from psychiatric problems. A more recent portrait is the dependent adult child who lives at home and relies on aging parents for shelter, food, and money.

Little is known about the incidence of elder abuse, the occurrence of its various forms, or the relationship, gender, and age of its victims and perpetrators. Studies suggest, however, that material (financial) abuse is its most common form, with physical abuse much less frequent. Victims tend to be more physically impaired and functionally dependent than other seniors, and more often than not are female. Four per cent of the senior population is generally considered to be victim of some form of abuse or neglect. A large scale American study completed in 1998 found, among other things, that perpetrators in 90% of cases were spouses or relatives. Other studies suggest that residents of personal care homes are also vulnerable to physical and psychological abuse. Though any such investigation is beyond the scope of this Report, the Commission believes that further studies should be undertaken to provide information on the origins, extent, and severity of elder abuse.

C. THE LAW IN MANITOBA

A number of legislative regimes in place in Manitoba apply to adults in need of protection, including the *Criminal Code*, *The Family Maintenance Act*, *The Mental Health Act*, *The Vulnerable Persons Living with a Disability Act*, *The Powers of Attorney Act*, and *The Health Care Directives Act*. In addition, Manitoba's *Domestic Violence and Stalking Prevention, Protection*

and Compensation and Act came into force on September 30, 1999. A variety of other legal remedies have some application to elder abuse. Although there is no single regime in Manitoba for the protection of all vulnerable adults or for older persons in particular, existing law does offer protection and compensation for victims of violence and financial exploitation.

While it may be a powerful weapon against abuse, unfortunately, the *Criminal Code* is too blunt an instrument. The criminal law is not concerned with the individual victim or the complexities of intimate relationships, but with broader social goals of reducing crime. As a result, a victim may avoid initiating the prosecution of a family member because of fear of rejection by other family members, loss of care, or being alone. The intimacy of the relationship and the accommodation of abusive behaviour over time may obscure the criminality of the conduct, and physical retaliation is a real possibility. Peace bonds are available under the *Criminal Code*, but the process is time consuming and uncertain, and the protection offered may be illusory.

The Family Maintenance Act deals with marital breakdown, and only applies to opposite-sex couples who have cohabited in a sexual relationship. Most of the provisions relevant to the issues discussed in this Report are now dealt with under *The Domestic Violence and Stalking Prevention, Protection and Compensation Act*. *The Mental Health Act* is a form of adult guardianship legislation intended to protect an adult with a mental disorder as defined in the Act or who is otherwise incapable of managing his or her affairs. The Act permits the appointment of a committee to take charge of the adult's affairs, but its all-or-nothing approach to competence is problematic. *The Vulnerable Persons Living with a Mental Disability Act* is also a form of adult guardianship law, and applies to persons with significantly impaired intellectual functioning, manifested prior to the age of 18, who are unable, alone or with the assistance of a support network, to manage their daily affairs, personal care and property. The Act seems to balance protection with individual autonomy, but its scope is very narrow.

The Powers of Attorney Act sets out a regime by which an adult can execute an enduring power of attorney, which allows the attorney to manage the donor's finances if and when the donor becomes mentally incompetent, thus avoiding judicial appointment of a committee. The Act, as amended in 1996, ensures that the attorney is accountable.

Finally, *The Personal Health Care Directives Act* permits individuals to instruct family members and medical practitioners on the nature and extent of medical or other treatment if, at some future time, the adult is incompetent or unable to communicate his or her wishes.

D. COMPREHENSIVE ADULT PROTECTION REGIMES

All of the Atlantic provinces, and British Columbia, have enacted "comprehensive" adult protection regimes, although the British Columbia legislation will not come into effect until February 1, 2000. Such legislation may address issues of guardianship, competence, mental disability, or committeeship, but its defining characteristic is its emphasis on protection against abuse and exploitation by means of agency intervention.

Generally speaking, comprehensive adult protection legislation applies to persons 18 and older who are incapable of protecting themselves from mistreatment as a result of mental disorder, illness, disability, duress, or physical restraint. By offering some combination of mandatory and optional services, the legislation also addresses the circumstances of competent and capable adults who have not taken measures to protect themselves.

The powers given to the intervening agencies, and the protection afforded to protected persons, vary from jurisdiction to jurisdiction. Some statutes authorize investigation, and entry into the home, only on the basis of reports of actual victimization, while others permit it on the basis of a perceived risk. Among the striking features of the legislation are powers of forcible entry, and provisions for on-site medical examination and removal of the adult with or without consent.

While comprehensive adult protection regimes may give agencies a necessary "foot in the door" in cases of suspected or actual adult abuse or neglect, such regimes appear to compromise individual autonomy and due process rights, which may not be recognized until long after an adult and his or her intimates have experienced significant loss of liberty and legal repercussions. It is this compromise of rights that is the most serious failing of comprehensive adult protection regimes, and for that reason the Commission does not recommend that such legislation be enacted in Manitoba.

E. DOMESTIC VIOLENCE LEGISLATION IN CANADA AND OPTIONS FOR REFORM

Four Canadian provinces have enacted "domestic violence" legislation: Alberta, Saskatchewan, Manitoba, and Prince Edward Island. Such legislation is concerned, not with vulnerable adults *per se* and their care by the state, but with the limited matter of providing victims of domestic violence (and, in Manitoba, of stalking) with ready access to protection orders.

Manitoba's *Domestic Violence and Stalking Prevention, Protection and Compensation Act* arose from the Commission's Report on *Stalking* (Report #98, 1997) and the Schulman Report on a domestic murder-suicide (*A Study of Domestic Violence and the Justice System in Manitoba* (1997)). Recommendations of the two Reports were merged to cover domestic violence by a cohabitant, former cohabitant, or parent of a child, and stalking by any person.

Insofar as they deal with domestic violence, the Manitoba, Saskatchewan, Alberta, and Prince Edward Island Acts are similar in that they share the same raison d'être and same remedial alternatives, albeit with some notable substantive and procedural differences. The Acts balance the need to protect victims of abuse with an individual's right to autonomy more successfully than do comprehensive adult protection regimes. Unlike the comprehensive regimes, no agency as such is involved, nor must the adult be identified by anyone other than a justice of the peace or a judge as a person in need of protection. Domestic violence legislation thus avoids stigmatizing designations and preserves the individual's privacy. Moreover, no case planning is thrust upon an

uncertain or unwilling victim, and the available remedies are sensitive to the needs and autonomy of victims. Nevertheless, the Commission believes that there is room, and in some cases a need, for improvement in Manitoba's legislation and the enforcement of orders.

Among its many recommendations, the Commission recommends that *The Domestic Violence and Stalking Prevention, Protection and Compensation Act* be amended to provide greater protection to victims of abuse by widening the definition of "domestic violence". Such an expansion would give designated justices of the peace and the court some leeway in determining whether conduct that does not fall squarely within the list of specified conduct should be characterized as violence in particular circumstances; including a vicarious responsibility provision stating that a respondent who encourages or solicits another person to commit an act that, if done by the respondent, would constitute family violence, is deemed to have committed that act personally; extending protection in respect of persons who have easy and frequent access to another person's household, regardless of whether the persons are related to one another by blood, marriage, or shared responsibility for the care of children, or whether they reside or have resided together; and permitting a broader range of persons, including certain designated persons (such as social workers) and friends or relatives (with the permission of the designated justice of the peace or the court) to apply for orders on behalf of victims.

The Commission also recommends that the Act be amended to include a list of factors to assist justices of the peace in determining emergency protection orders (which list ought to include consideration of the best interests of any child of the victim) and that designated justices of the peace and the Court of Queen's Bench be provided with the means to respond appropriately to particular circumstances of domestic abuse by allowing for the inclusion in an order of any provision considered necessary. Minimally, the Act should enable justices of the peace to grant sole occupancy of a residence; award temporary care and custody of a child; award temporary possession of a vehicle; and prohibit the respondent from dealing with specified property.

F. ADDITIONAL REFORM MEASURES

The Commission has also recommended a number of additional measures to enhance protection for vulnerable adults. For example, a Law Clinic, dedicated to older adults and other victims of abuse could provide specialized legal information and advice. Other non-legal responses to elder abuse might include public education to improve knowledge of rights and remedies, professional education, extending the reach of existing programs, developing new services and interagency protocols and, generally, increasing voluntary points of contact with those who can provide services, referral, and advice. These measures are empowering rather than reactive and enhance rather than limit the options available to older and other vulnerable persons. An issue that requires further attention is the financial exploitation of vulnerable adults. Finally, to improve the reporting of instances of adults in need of protection, the Commission recommends that professional and care-providing organizations develop mandatory reporting standards for members as a matter of professional obligation.

RÉSUMÉ

DU

RAPPORT SUR LA PROTECTION DES PERSONNES AGÉES ET AUTRES ADULTES VULNÉRABLES

RÉSUMÉ

A. INTRODUCTION

Ce projet est né d'une demande soumise à la Commission par le Centre de ressources pour les aînés victimes de mauvais traitements (Centre « Perspectives des aînés » du Manitoba) pour que celle-ci enquête sur l'état actuel de la législation concernant les mauvais traitements infligés aux personnes âgées du Manitoba. Au début de ses travaux de recherche, la Commission s'est rendue compte que les questions à étudier ne se limitaient pas aux mauvais traitements à l'égard des personnes âgées mais qu'elles portaient plutôt sur la notion plus générale de recours judiciaire pour toutes les victimes de violence familiale.

Dès le début, la Commission a rédigé un document de travail sur les mauvais traitements envers les aînés et la protection des adultes, et elle l'a distribué aux personnes intéressées pour obtenir leurs commentaires. Ce rapport fait état des réflexions de la Commission sur ces commentaires.

B. AMPLEUR DU PROBLÈME

Les mauvais traitements infligés aux personnes âgées ne représentent qu'un aspect de la violence familiale, qui inclut les mauvais traitements d'ordre physique et affectif des enfants et des partenaires ainsi que l'exploitation sexuelle des enfants. Comme d'autres formes de violence familiale, les mauvais traitements à l'endroit des personnes âgées peuvent prendre diverses formes : mauvais traitements physiques ou affectifs, exploitation financière, restriction ou déni des droits et libertés, et négligence active ou passive. L'agresseur typique est par exemple le fournisseur de soins pathologique, éventuellement toxicomane ou alcoolique, ou qui souffre de problèmes psychiatriques. Plus récemment, on a observé que l'agresseur pouvait aussi être un enfant adulte à charge qui vit au domicile familial ou qui dépend de ses parents âgés pour le logement, la nourriture et les finances.

On connaît peu de choses sur la fréquence des mauvais traitements envers les personnes âgées, sur les diverses formes qu'ils peuvent prendre, sur le lien qui existe entre les victimes et les agresseurs, ou sur l'âge et le sexe de ces personnes. Selon certaines études cependant, l'exploitation matérielle (financière) est la forme de violence la plus courante, les mauvais traitements d'ordre physique étant beaucoup moins fréquents. Les victimes ont tendance à être plus handicapées physiques et fonctionnellement dépendantes que d'autres personnes âgées, et sont plus souvent de sexe féminin. On considère généralement que quatre pour cent des aînés sont victimes d'une forme quelconque de violence ou de négligence. Terminée en 1998, une étude américaine à grande échelle a révélé, entre autres choses, que dans 90 % des cas, les agresseurs étaient des conjoints ou des membres de la famille. D'autres études suggèrent que les résidents des foyers de soins personnels sont aussi vulnérables en ce qui concerne les mauvais traitements d'ordre physique et affectif. Même si une enquête du genre dépasse le cadre de ce rapport, la Commission estime qu'il

faudrait entreprendre des études plus approfondies sur les origines, l'ampleur et la gravité des mauvais traitements infligés aux aînés.

C. LA LÉGISLATION AU MANITOBA

Un certain nombre de textes législatifs en place au Manitoba s'appliquent aux adultes qui ont besoin de protection, notamment : le *Code criminel*, la *Loi sur l'obligation alimentaire*, la *Loi sur la santé mentale*, la *Loi sur les personnes vulnérables ayant une déficience mentale*, la *Loi sur les procurations* et la *Loi sur les directives en matière de soins de santé*. De plus, adoptée au Manitoba, la *Loi sur la violence familiale et la protection, la prévention et l'indemnisation en matière de harcèlement criminel* est entrée en vigueur le 30 septembre 1999. Dans une certaine mesure, diverses autres solutions juridiques s'appliquent également en cas de violence perpétrée contre des personnes âgées. Bien qu'au Manitoba il n'existe pas de loi portant exclusivement sur la protection de tous les adultes vulnérables, ou plus particulièrement des personnes âgées, la législation actuelle offre cependant une protection et une indemnisation aux victimes de violence et d'exploitation financière.

Même s'il représente peut-être une arme solide contre les mauvais traitements, le *Code criminel* manque malheureusement de tranchant. Il ne se préoccupe pas de la victime en tant qu'individu ni de la complexité des relations intimes, mais plutôt d'atteindre un objectif social plus vaste qui est de réduire la criminalité. En conséquence, il arrive que les victimes renoncent à toute poursuite contre un membre de leur famille par crainte de se faire rejeter par les autres membres de la famille, de ne plus recevoir de soins ou de se retrouver seules. Le caractère intime de la relation et l'accomodation à un comportement violent avec le temps risquent d'obscurcir le caractère criminel du comportement et peuvent fort bien mener à un acte de revanche sur le plan physique. En vertu du *Code criminel*, il est possible de faire signer une obligation de ne pas troubler la paix publique mais le processus est long et incertain, et la protection offerte peut être illusoire.

La *Loi sur l'obligation alimentaire* concerne les ruptures de mariage et ne s'applique qu'aux couples dont les partenaires de sexes différents ont cohabité et vécu une relation sexuelle. La plupart des éléments qui se rapportent aux questions abordées dans ce rapport font maintenant partie des dispositions de la *Loi sur la violence familiale et la protection, la prévention et l'indemnisation en matière de harcèlement criminel*. La *Loi sur la santé mentale* est une forme de loi sur la tutelle des adultes visant à protéger les adultes ayant des troubles mentaux, comme le définit la *Loi*, ou qui sont incapables de gérer leurs affaires. La *Loi* prévoit la nomination d'un curateur pour prendre en charge les affaires de ces personnes, mais sa conception du genre tout ou rien en matière de capacité est problématique. La *Loi sur les personnes vulnérables ayant une déficience mentale* constitue également une forme de loi sur la tutelle des adultes et s'applique aux personnes qui ont de graves déficiences intellectuelles, s'étant manifestées avant l'âge de 18 ans, et qui sont incapables, seules ou avec l'aide d'un réseau de soutien, de gérer leurs biens et leurs affaires quotidiennes, et de se soigner. La *Loi* semble faire l'équilibre entre la protection et l'autonomie individuelle, mais son cadre est très limité.

La *Loi sur les procurations* prévoit un régime selon lequel un adulte peut signer une procuration durable, qui autorise le mandataire à gérer les finances du mandant lorsque celui-ci devient mentalement incapable, ce qui évite ainsi la nomination d'un curateur. Depuis qu'elle a été modifiée en 1996, la *Loi* exige que le mandataire rende compte de sa gestion.

Enfin, la *Loi sur les directives en matière de soins de santé* permet à une personne de donner des instructions aux membres de sa famille et aux médecins sur la nature et la quantité de soins médicaux ou autres qu'elle peut recevoir si, dans l'avenir, elle est incapable de communiquer ses volontés.

D. SYSTÈMES COMPLETS DE PROTECTION DES ADULTES

Toutes les provinces de l'Atlantique, ainsi que la Colombie-Britannique, ont adopté un système « complet » de protection des adultes, bien qu'en Colombie-Britannique, la loi n'entre en vigueur que le 1er février 2000. Un tel système peut couvrir les questions de tutelle, de capacité, de déficience mentale ou de curatelle, mais sa particularité est qu'il met l'accent sur la protection contre les mauvais traitements et contre l'exploitation en prévoyant l'intervention d'organismes.

De façon générale, une législation complète sur la protection des adultes s'applique aux personnes de 18 ans minimum qui sont incapables de se protéger seules contre les mauvais traitements en raison d'une déficience mentale, d'une maladie ou d'une invalidité, ou pour cause de coercition ou de contrainte physique. En proposant un mélange de services obligatoires et facultatifs, la législation vise également les cas d'adultes qui sont capables mais qui n'ont pas pris de mesure pour se protéger.

Les pouvoirs accordés aux organismes intervenants et la protection offerte aux victimes varient d'une province à l'autre. Certaines lois n'autorisent une enquête ou l'entrée dans le domicile qu'après l'établissement de rapports faisant état d'actes de violence effectifs alors que d'autres permettent ces interventions en cas de risque perçu. Parmi les éléments clés de la législation, il faut mentionner la prise de possession par la force, la possibilité de procéder à un examen médical sur les lieux et de faire sortir l'adulte avec ou sans son consentement.

Bien que les systèmes complets de protection des adultes donnent peut-être aux organismes « un pied dans la porte » nécessaire dans les cas de mauvais traitements ou de négligence soupçonnés ou réels à l'endroit d'adultes, ils semblent compromettre le droit à l'autonomie individuelle et le droit à l'application régulière de la loi, ces droits risquant de n'être pris en considération que longtemps après qu'un adulte et ses proches ont perdu une grande part de leur liberté et subi des répercussions juridiques. C'est ce compromis vis-à-vis des droits qui constitue le plus gros inconvénient de ces systèmes, et pour cette raison, la Commission ne recommande pas qu'ils soient adoptés au Manitoba.

E. LA LÉGISLATION AU CANADA EN MATIÈRE DE VIOLENCE FAMILIALE ET LES POSSIBILITÉS DE RÉFORME

Quatre provinces canadiennes ont adopté une législation sur la « violence familiale » : l'Alberta, la Saskatchewan, le Manitoba et l'Île-du-Prince-Édouard. Cette législation porte, non pas sur les adultes vulnérables à proprement parler ni sur leur prise en charge par l'État, mais sur l'aspect restreint de l'accès immédiat des victimes de violence familiale (et au Manitoba, aux victimes de harcèlement criminel) aux ordonnances de protection.

Au Manitoba, la *Loi sur la violence familiale et la protection, la prévention et l'indemnisation en matière de harcèlement criminel* a découlé du rapport de la Commission sur le harcèlement criminel (Rapport n° 98, 1997) et du Rapport Schulman sur un cas de meurtre-suicide (*A Study of Domestic Violence and the Justice System in Manitoba*, 1997). Les recommandations de ces deux rapports ont été regroupées pour inclure la violence familiale par un cohabitant, par un ancien cohabitant ou par le parent d'un enfant, et le harcèlement criminel par n'importe quelle personne.

Dans la mesure où elles traitent de la violence familiale, les lois du Manitoba, de la Saskatchewan, de l'Alberta et de l'Île-du-Prince-Édouard sont semblables puisqu'elles ont la même raison d'être et qu'elles offrent les mêmes possibilités de recours, sauf qu'elles ont quelques différences marquées tant sur le fond que sur la forme. Par rapport aux systèmes complets de protection des adultes, ces lois respectent plus efficacement l'équilibre entre la nécessité de protéger les victimes de violence familiale et le droit d'un individu à l'autonomie. Contrairement à ce que préconisent les systèmes complets, aucun organisme en tant que tel n'intervient, et l'adulte ne peut être identifié comme une personne ayant besoin de protection que par un juge de paix ou un juge. Ainsi, une loi sur la violence familiale évite la stigmatisation et préserve la vie privée de l'individu. De plus, aucun plan n'est imposé à une victime hésitante ou réticente, et les solutions sont adaptées aux besoins et à l'autonomie des victimes. Cependant, la Commission estime qu'il est souhaitable, voire nécessaire, d'améliorer la loi manitobaine et l'exécution des ordonnances.

Parmi ses nombreuses recommandations, la Commission suggère que la *Loi sur la violence familiale et la protection, la prévention et l'indemnisation en matière de harcèlement criminel* soit modifiée en élargissant la définition de « violence familiale », de façon à mieux protéger les victimes. Un tel élargissement donnerait plus de marge de manoeuvre aux juges de paix désignés et au tribunal pour déterminer si un comportement qui ne correspond pas exactement à l'un des comportements précis figurant dans la liste établie devrait être caractérisé de comportement violent, dans certaines circonstances. Il faudrait en outre que la *Loi* inclue une disposition de responsabilité du fait d'autrui selon laquelle un intimé qui encourage ou sollicite une autre personne pour qu'elle commette un acte qui, s'il était perpétré par l'intimé, constituerait un acte de violence familiale, est réputé avoir commis cet acte personnellement. La *Loi* devrait aussi prévoir une protection à l'égard des personnes qui ont souvent et facilement accès au domicile d'une autre personnne, que ces personnes soient ou non liées par le sang, par le mariage ou par la responsabilité partagée des enfants, ou qu'elles habitent ou qu'elles aient habité ensemble. Enfin, la *Loi* devrait permettre à

d'autres personnes, y compris certaines personnes désignées (comme des travailleurs sociaux) et des amis ou membres de la famille (avec l'autorisation du juge de paix désigné ou du tribunal) de demander une ordonnance au nom des victimes.

La Commission recommande également que la *Loi* soit modifiée afin d'inclure une liste de facteurs permettant d'aider les juges de paix à déterminer les cas urgents d'ordonnance de protection (cette liste devrait tenir compte des meilleurs intérêts des enfants de la victime) et que l'on donne aux juges de paix désignés et à la Cour du Banc de la Reine les moyens de réagir convenablement aux circonstances particulières entourant les cas de violence familiale en autorisant l'inclusion, dans l'ordonnance, de n'importe quelle disposition qui s'avère nécessaire. Au minimum, la *Loi* devrait permettre aux juges de paix d'accorder à quelqu'un l'occupation exclusive d'un logement, de confier provisoirement à quelqu'un le soin et la garde d'un enfant, d'accorder la possession provisoire d'un véhicule et d'interdire à l'intimé toute transaction concernant des biens précis.

F. AUTRES MESURES

La Commission a également recommandé un certain nombre de mesures supplémentaires pour mieux protéger les adultes vulnérables. Ainsi, une formation juridique pratique, destinée aux personnes âgées et à d'autres victimes de violence familiale, pourrait offrir des renseignements et des conseils juridiques spéciaux. Parmi les autres suggestions non juridiques pour lutter contre la violence envers les personnes âgées, citons : l'éducation du public de façon à mieux faire connaître les droits et les recours possibles, l'éducation des professionnels, la diffusion élargie des programmes existants, l'établissement de nouveaux services et de protocoles liant les organismes et, de façon générale, l'augmentation des points de contact, au choix des victimes, avec ceux qui peuvent offrir des services, notamment d'aiguillage et de consultation. De telles mesures sont habilitantes plutôt que réactives et elles améliorent plutôt qu'elles ne limitent les solutions offertes aux personnes âgées et aux autres personnes vulnérables. L'exploitation financière des adultes vulnérables est une autre question qui exige qu'on y prête davantage attention. Enfin, pour favoriser la dénonciation des cas d'adultes ayant besoin de protection, la Commission recommande que les organisations professionnelles et les organismes de prestation de soins établissent des normes obligeant leurs membres à signaler ce genre de situations, dans le cadre de leurs obligations professionnelles.